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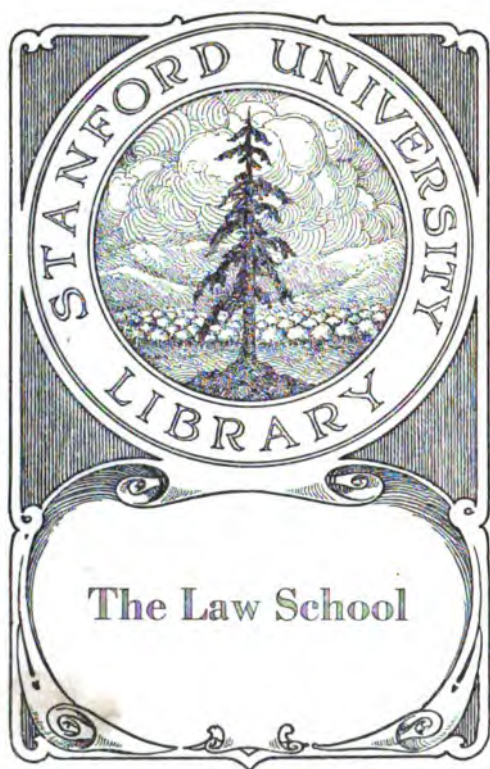
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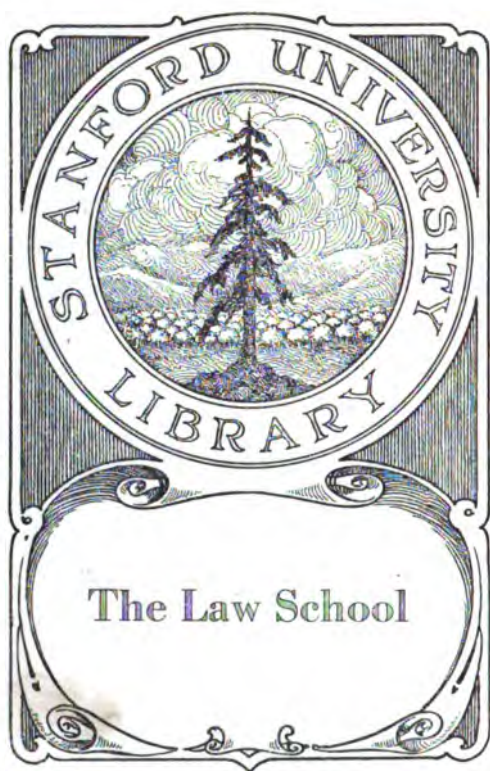
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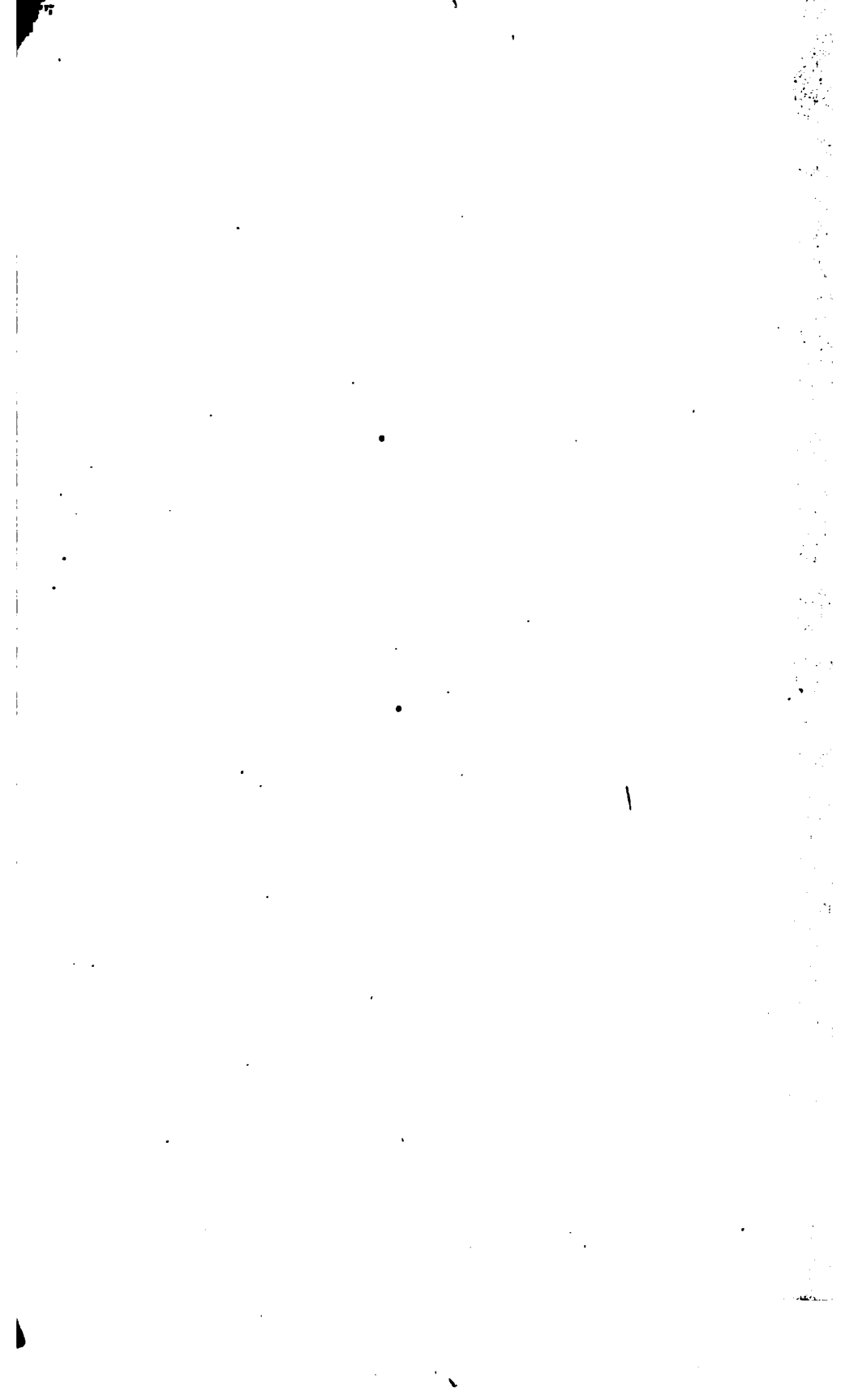


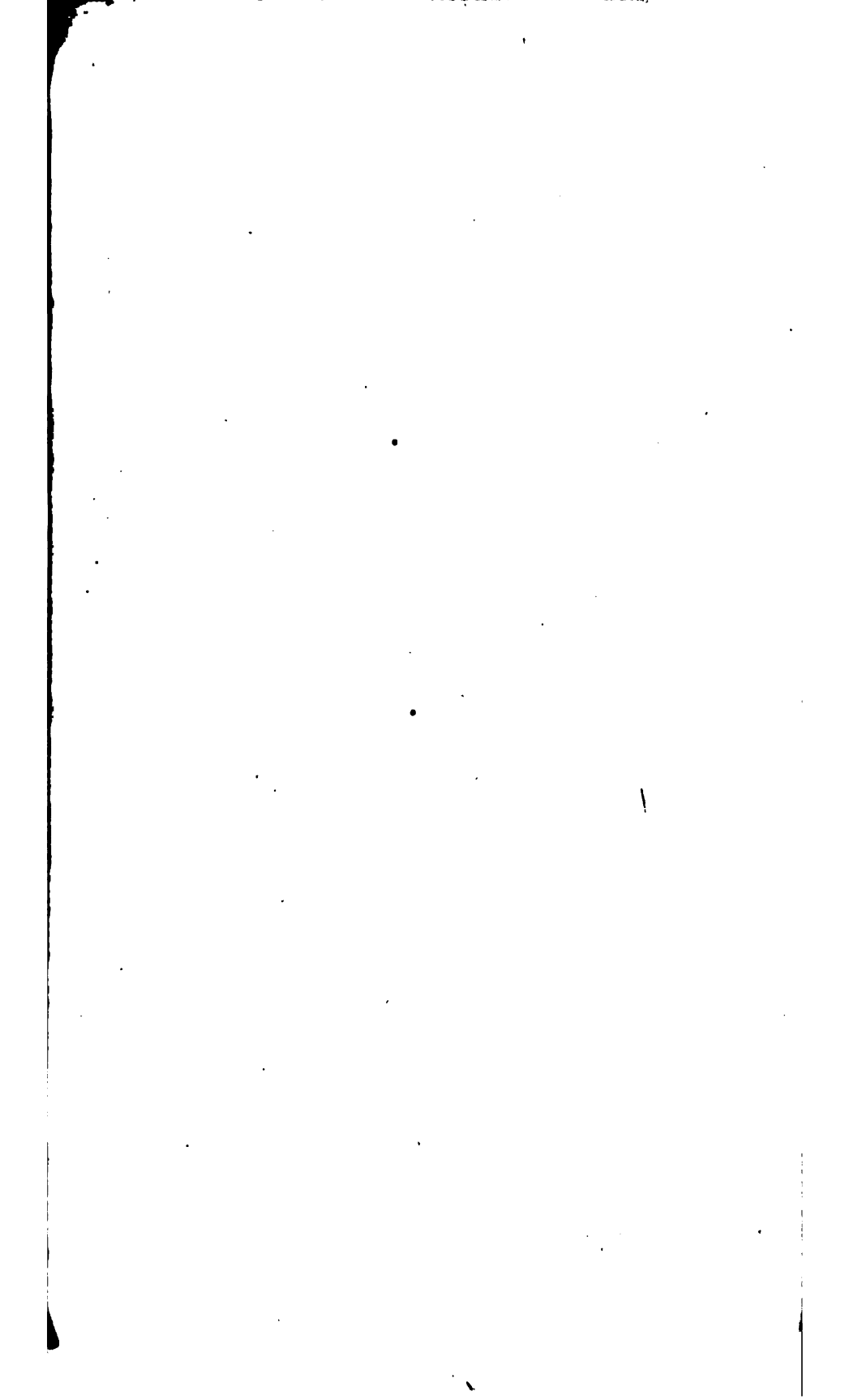


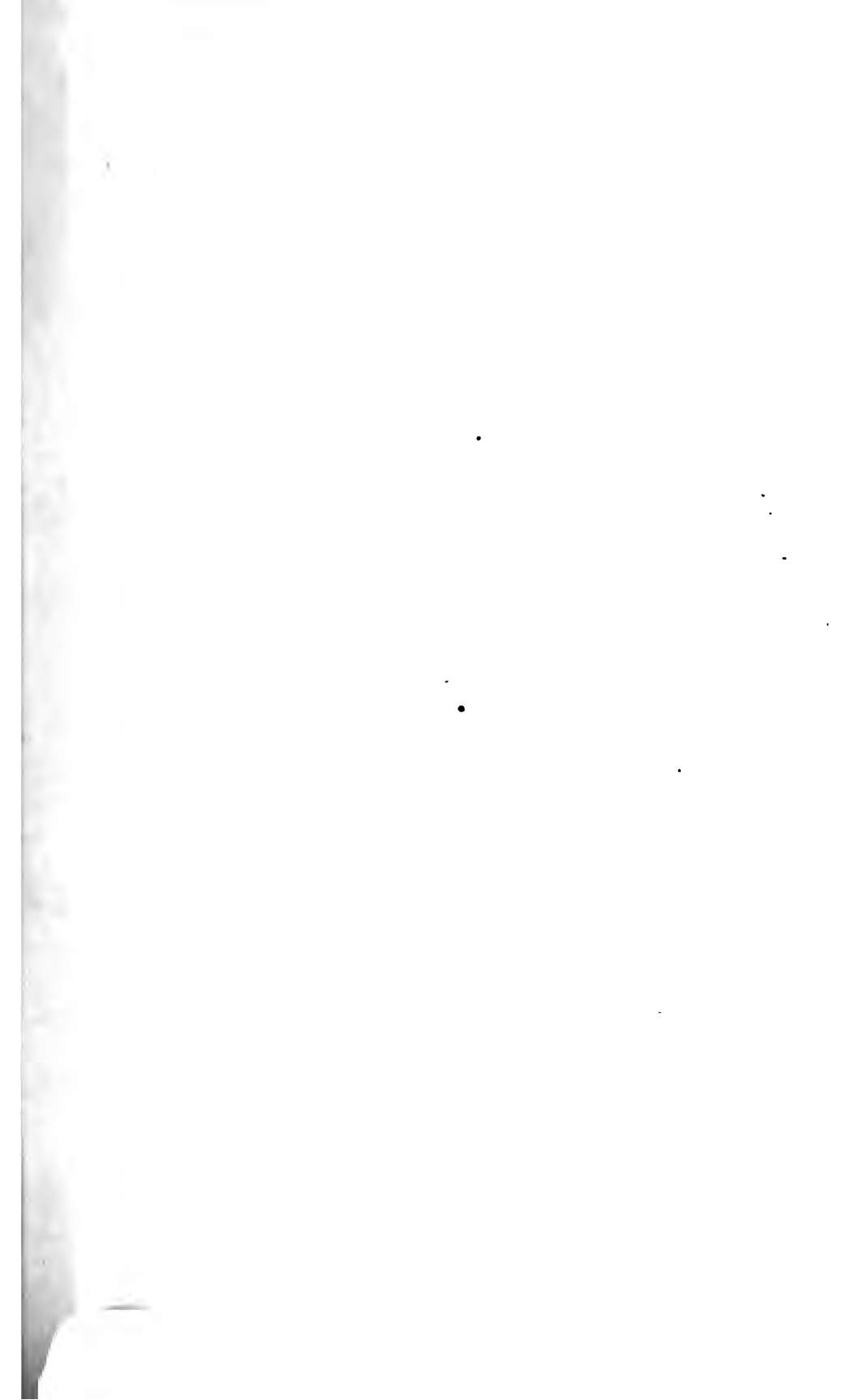












REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,

WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
COUNSELLOR AT LAW.

VOLUME IV.

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NAMES OF THE JUDGES

OF THE

SEVERAL COURTS IN ENGLAND

**DURING THE TIME OF THE DECISION OF THE CASES REPORTED
IN THE PRESENT VOLUME.¹**

QUEEN'S BENCH.

The Right Hon. Sir ALEXANDER JAMES EDMUND COOKBURN, Bart., Ch.J.

Sir COLIN BLACKBURN, Knt.

Sir JOHN MELLOR, Knt.

Sir ROBERT LUSH, Knt.

Sir RICHARD QUAIN, Knt.

Sir THOMAS DICKSON ARCHIBALD, Knt.

COMMON PLEAS.

The Right Hon. Sir WILLIAM BOVILL, Knt. Ch. J.

Sir JAMES SHAW WILLES, Knt.

Sir JOHN BARNARD BYLES, Knt.

Sir HENRY SINGER KEATING, Knt.²

Sir WILLIAM BALIOL BRETT, Knt.

Sir ROBERT GROVE, Knt.

Sir GEORGE DENMAN, Knt.

Sir GEORGE ESSEX HONYMAN, Bart.

¹The changes of judges in England have, as a matter of convenience, been brought down to the time of publication instead of ending with the past year. Some of the new judges may not have sat in any of the cases herein reported.

² See vol. 3.

COURT OF EXCHEQUER.

The Right Hon. Sir FITZ ROY KELLY, Knt., C. B.

Sir SAMUEL MARTIN, Knt.

Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.

Sir WILLIAM FRY CHANNELL, Knt.¹

Sir GILLERY PIGOT, Knt.

Sir ANTHONY CLEASBY, Knt.

Sir CHARLES EDWARD POLLOCK, Knt.²

Right Hon. Lord SELBORNE, Lord Chancellor.

Right Hon. Sir WILLIAM MILBOURNE JAMES, } Lord Justices.
Right Hon. Sir GEORGE MELLISH, }

Hon. Sir RICHARD MALINS, }
Hon. Sir J MES BACON } Vice Chancellors.
Hon. Sir JOHN WICKENS. }

Right Hon. JOHN, LORD ROMILLY, } Master of the Rolls.³
Right Hon. GEORGE JESSEL.⁴ }

Hon. Sir JAMES BACON, Chief Judge in Bankruptcy.

HIGH COURT OF ADMIRALTY.

Right Hon. Sir ROBERT JOSEPH PHILLIMORE, Knt., D. C. L.

PROBATE AND DIVORCE.

The Right Hon. LORD PENZANCE.⁵

Right Hon. Sir JAMES HANNEN, Knt.⁶

¹ Sir WILLIAM FRY CHANNELL, resigned about the first of January, 1878, and died on the 25th of February. 54 Law Times, 163, 331; 8 Law Journal, 2.

² Mr. CHARLES EDWARD POLLOCK was appointed January 4th, 1878, to succeed Sir WILLIAM FRY CHANNELL. 54 Law Times, 196; 8 Law Journal, 21.

³ On the 25th of March, 1873, LORD ROMILLY resigned, and retired from the Rolls. 54 Law Times, 406; 8 Law Journal, 179, 184.

⁴ On the 2d of August, 1873, Sir GEORGE JESSEL, Solicitor-General, was appointed Master of the Rolls. 8 Law Journal, 471, 484; 55 Law Times, 261. He is said to be the first person professing the Hebrew religion who has occupied the position of judge of one of the higher courts of England.

⁵ Lord PENZANCE resigned the office of Judge of the Probate and Divorce Courts about the first of November, 1872. 54 Law Times, 3; 7 Law Journal, 748.

⁶ Sir JAMES HANNEN was appointed Judge of the Court for Probate and Divorce cases and took his seat as such on the 21st day of November, 1872. 54 Law Times, 31, 43, 275. 8 Law Journal, 785, 822.

NAMES OF THE JUDGES.

v

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord President.

Lord Chancellor.

Lord Justices of the Court of Appeal in Chancery.

Master of the Rolls.

Vice Chancellors.

Lord Chief Justice of the Court of Queen's Bench.

Lord Chief Justice of the Common Pleas.

Lord Chief Baron of the Court of Exchequer.

Judge of the High Court of Admiralty.

Judge of the Court of Probate.

Sir BARNES PEACOCK, Sir MONTAGUE EDWARD SMITH, Sir ROBERT P. COLLIER.	}	Paid Members.
---	---	---------------

THE MEMBERS USUALLY ATTENDING THE COMMITTEE ARE:

Right Hon Lord WESTBURY.

Right Hon. Lord ROMILLY.

Right Hon. Lord CAIRNS.

Right Hon. Lord HATHERLEY.

Right Hon. Sir JAMES W. COLVILLE.

Right Hon. Sir ROBERT PHILLIMORE.

Right Hon. Sir JOSEPH NAPIER.

Right Hon. Lord Justice JAMES.

Right Hon. Lord Justice MELLISH.

Sir BARNES PEACOCK.

Sir MONTAGUE EDWARD SMITH.

Sir ROBERT P. COLLIER.

The Prelates of the church of England, who are Privy Counsellors, are members of the Judiciary Committee on Appeals to Her Majesty in Council under the church discipline act, but not otherwise.

ADDENDA ET CORRIGENDA.

Page 267 note cite *Commonwealth v. Barney*, 4 Brewster, 408, *Speer v. Davis*, 38 Ind., 271.

- " 353 " *Cater v. Michigan Central R. R.*, 1 Bissell, 85.
- " 392 " *Jeffersonville, etc. v. Rogers*, 38 Ind., 126; *Pittsburg, etc. v. Donahue*, 70 Penn. St., 119; 37 Cal., 400; 24 Md., 84.
- " 457 " *Inhabitants, etc. v. Stanley*, 60 Maine, 472.
- " 475 " *State v. Maine Central Railway*, 60 Maine, 490.
- " 519 " *State v. Porter*, 34 Iowa, 131.
- " 686 " *Smith v. Dorsey*, 38 Ind., 451.
- " 711 " *Krepps v. Krepps*, 4 Brewster, 38; *McClure v. Mansell*, 4 Brewster, 119.
- " 724 " Masson's Appeal, 70 Penn. St., 80-81.
- " 775 " The Case of *Gilbert v. Priest*, 63 Barb., 389, has been reversed by the General Term of the Supreme Court. 14 Abb. Prac N. S., 165.

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APPEAL CASES

REPORTED BY

HOUSE OF LORDS.

[Law Reports, 5 House of Lords, 606.]

May 7, 10, 1872.

*THOMAS GRIFFIES DIXON, Appellant; and LEWIS HENRY [606]
EVANS, Respondent.

In re AGRICULTURIST CATTLE INSURANCE COMPANY.

Company — Contributory — Compromise — Directors — Powers — Costs.

Supposing it to be within the power of each of two parties to make a compromise, all that a Court of Justice has to do with respect to it, is to ascertain that it has been *bond fide* made.

If so made, then, unless manifestly *ultra vires* of the parties, a Court of Justice ought to respect it, and not allow it to be questioned.

W. was an official in Scotland of an English company; the company desired to have a board of directors there. W. suggested to D., who lived in Scotland, to take shares and become one of the intended directors. D. objected on the ground that it was not a company of limited liability; W. assured him that he should be secured against loss, and that a bill was then about to be presented to Parliament to limit the shareholders' liability. D. thereon consented, and W. applied in his name for ten shares, obtained an allotment of ten, and paid the deposit on them. This deposit was never repaid by D. to W. D., at W.'s request, signed a proxy paper, and also a receipt for a dividend, which, however, was in fact paid to W. The bill in Parliament was not passed. Some time afterwards, a call was made on D. in respect of his shares, of which he took no notice; another call was made; he denied his liability, and desired W. to state the facts to the directors, and to claim his discharge from liability. W. did so; and the directors, who by the resolution of a general meeting possessed powers to make compromises in disputes with shareholders (though not, in terms, to cancel shares), consented that, on D.'s paying a certain call then due his shares should be cancelled. The money was paid, and D.'s name was struck out of the list, and a balance sheet with his name struck out was presented at a general meeting, as containing a list of persons whose shares had been cancelled. So things remained till some years afterwards, when the company was ordered to be wound up; and D.'s name was put upon the list of contributories:

Held, that it must be removed therefrom; that the directors had had the power to make a compromise of a disputed claim, that this case came within the power and that the power had been *bond fide* and rightly exercised.

At the Rolls, where the case was first heard, D.'s name was ordered to be removed from the list of contributories. On appeal, the Lord Justice directed it to be replaced on the list. This house reversed the Lord Justice's order, restored that of the Master of the Rolls, and directed that the costs on the appeal in the Lord Justice's Court should be repaid to D.

THIS was an appeal against a decision of Lord Justice Giffard, by which a previous decision of the Master of the Rolls had been

607] reversed⁽¹⁾. The facts are fully stated in the report in the court below, and it is not necessary here to give more than a summary of them.

The Agriculturist Cattle Insurance Company was formed in 1845 as an unlimited company⁽²⁾. Mr. D. Wilkie was the manager for the company in Scotland, and the company being in want of a board of directors there, Mr. Wilkie, who was acquainted with Mr. Dixon, the Appellant, suggested to him that he should become a shareholder in the company, in order to be one of the intended board of directors. The Appellant objected that the company was not one of limited liability, and Wilkie assured him that there was about to be brought into Parliament a bill to render it a limited company, and that if he became a shareholder he should not be required to sign the deed of settlement, and that in the meantime he should be protected against all loss. On the representation and promise thus made, the Appellant consented. Wilkie accordingly procured for him an allotment of ten shares, and paid the deposits, which was never repaid to him by Dixon. In May, 1846, Dixon signed the appointment of a proxy for a meeting. In January, 1847, a dividend was declared at the rate of three per cent for the half year, and this dividend was actually received by Wilkie, though the receipt for its amount was signed by Dixon himself. These were the only two acts performed by Dixon in his character of a shareholder. A bill was brought into Parliament to create the company one of limited liability, but did not pass. In February, 1848, a call of £1 per share was made, which Dixon refused to pay, although threatened with proceedings to enforce it. In August, 1848, there was a second call of £1 per share, on receiving notice of which Dixon wrote to Wilkie, reminding him of all that had occurred, and calling on him to explain this to the directors, Dixon observing: "I wish well to the company, and have uniformly insured my stock with it, but I do not think that, under the circumstances, I can be fairly held a responsible shareholder." The affairs of the company being embarrassed, meetings of the shareholders were held in October and November, 1848; and at a meeting of the 13th of 608] November, 1848, an arrangement known as "The Chippenham Arrangement"⁽³⁾ was made, by which power was given to the directors to release certain shareholders who paid up £4 per share on their shares, from any farther liability. Dixon, not considering himself a shareholder in the company, did not attend these meetings. Mr. Wilkie did what was re-

⁽¹⁾ Law Rep., 5 Ch. Ap. 79.

company quoted in *Spackman v. Evans*,

⁽²⁾ See the deed of settlement of the Law Rep., 3 H. L., 172, n.

⁽³⁾ Law Rep., 3 H. L., 180.

quired of him, and said in his letter to the secretary that "Dixon, in law, may probably be considered bound, but it is thought it would be considered equitable that he be released," and he asked the directors to "cancel Dixon's name on payment of the calls that have been made." The secretary finally wrote to Wilkie, "I think the directors will accept payment of calls, and allow these shares to be cancelled." The £4 per share were paid, and the shares declared to be cancelled. There was a general meeting of the shareholders on the 23d of November, 1849, at which a balance sheet was presented, with a statement of sums received on account of "shares cancelled," and there was under that head an entry of a receipt of £40 as from Mr. Dixon, on account of ten cancelled shares. The company was on the 28th March, 1861, ordered to be wound up, and Mr. Dixon's name was put on the list of contributories. On application to the master of the Rolls it was ordered to be struck off; but Lord Justice Giffard, on appeal, directed it to be restored, his Lordship saying: "I sincerely wish that I could follow the very able judgments of Lord St. Leonards and Lord Romilly in the House of Lords, in *Spackman v. Evans*, but unfortunately I cannot do so; for, able as those judgments were, they failed to prevail with the majority of their Lordships, and I must take the law to be this, namely, that in this particular company there is no power simply to cancel shares, no power simply to discharge a shareholder" (1). This appeal was then brought.

Sir R. Baggallay, Q.C., and Mr. Marten, for the appellant :

The decree of the court below was founded upon an erroneous view of previous decisions. The appellant never had been a shareholder; but even if it should be deemed that he had, without intending it, taken upon himself that character, he had done so only on a condition which had never been performed, and he had been *duly released from all its obligations. *Spack-* [609
man's Case (2); *Smallcombe's Case* (3). In the latter case much was said about the shareholder not having, within the proper time, done that which entitled him to the benefit of the Chippenham arrangement. But the House, seeing that all had been done *bonâ fide*, and that years had elapsed since his shares were cancelled, held that he was discharged. The same principle was declared in *Houldsworth's Case* (4), though there the assent to the Chippenham arrangement was not made within the time required by that arrangement itself, and therefore the directors were held not to have power after that date to release the shareholder. Here the course of this appellant has been uniform

(1) Law Rep., 5 Ch. Ap., 84.

(2) Law Rep., 3 H. L., 171.

(3) Ibid., 249.

(4) Ibid., 263.

He has always denied his liability, always repudiated the character of a shareholder, and there has not been any delay on his part. At the utmost he had only consented to accept shares on a condition, which condition had never been fulfilled. If the arrangement was binding on both parties the conditions of it had not been performed. If it was not binding on the company then there was no mutuality in it, and it could not be binding on the appellant: *Pellatt's Case* ⁽¹⁾. There the condition on which Pellatt took shares was that he was to receive orders for £1000 worth of goods, the amount to be set off against calls, and it was held that if this agreement was *ultrà vires* it could not be binding on either side; if *intra vires*, then the stipulations of it not having been performed, Pellatt was released. The object for which Dixon was here asked to take the shares was that he might become a director in Scotland. He never did become a director. In *Elkington's Case* ⁽²⁾ there was an agreement to take shares, and there was an agreement to take goods, but the two agreements were independent and distinct from each other, each was valid in itself, and therefore the failure to perform the one not affecting the performance of the other the liability on the shares taken was enforced. Here the whole agreement to take the shares depended on the being held free from all personal responsibility. That was the binding condition on which alone they were accepted. and that condition was not performed. 610] *Beresford's Case* ⁽³⁾ establishes *that there may be a contract with a company, and yet the person entering into it may not fill the character of a shareholder if he has not executed the deed of settlement. That was the principle on which the judgment of Lord Commissioner Baron Rolfe proceeded. Dixon here is in that situation, and, like Beresford, has been released from that imperfect contract. There may even be circumstances in which after executing the deed of settlement the shareholder can insist on being released from liability: *Coleman's Case* ⁽⁴⁾. But here he has not executed it. The 7 & 8 Vict. c. 110, s. 3, expressly distinguishes between "a subscriber" as a person "who has not executed the deed of settlement" and a "shareholder" as a person "who has executed the deed of settlement," and many other sections in that statute recognise the distinction.

The application of the clauses in the deed of settlement and of the Chippenham agreement in this case came before the Court in *Belhaven's Case* ⁽⁵⁾. There the facts were less favorable to Lord Belhaven than they are here, but the Court held that

⁽¹⁾ Law Rep. 2 Ch. Ap., 527.

⁽²⁾ Law Rep. 2 Ch. Ap., 511.

⁽³⁾ 2 Mac. & G., 197; 3 De G. & Sm., 175.

⁽⁴⁾ 1 De G. J. & Sm., 495.

⁽⁵⁾ 3 De G. J. & Sm., 41.

Lord Belhaven was not to be considered a shareholder. Yet here Lord Justice Giffard has, notwithstanding the strong circumstances of this case, treated Dixon as a shareholder, and has held that he has not been released from liability as such. It is submitted that these facts, that the conditions on which alone he consented to accept shares were not complied with, that he never executed the deed of settlement, and that he never interfered in any way in the affairs of the company, were an answer to any pretence to treat Dixon as a shareholder; but that even if he had ever borne that character he had been duly released from it, and that the cancellation of his shares, well known to the shareholders by being published in the balance-sheet of the company, had been acquiesced in for years, an acquiescence which was binding on the company itself.

In re Bowron, Baily's Case ⁽¹⁾, where an allotment of shares had been applied for and a deposit paid, the delay of the directors in performing what they had undertaken in their prospectus was held sufficient to release the allottee. And the case of *Meux's Executors* ⁽²⁾, shows that a company is bound by the conduct and statements of its agents and officers.

This matter really rests in contract, and therefore the lapse of six years after the cancelling of the shares is an [611] answer to this claim. Of course there might be a difference if there had been a deed under seal duly executed; but here Dixon never executed the deed.

Mr. *Southgate*, Q.C., and Mr. *F. W. Bush*, for the respondent:

There can be no question that Dixon was a shareholder. If so, the directors had no right to cancel his shares. Nothing had given them power to do that act, and there can be no acquiescence to validate an act which is entirely without authority. That he was and claimed to be a shareholder was proved by his execution of a proxy. That act was decisive of the character of his connection with the company. He does not in his own letter deny that he was a shareholder; he merely refers to the understanding between Wilkie and himself, and says: "I do not think that, under the circumstances, I can fairly be held a responsible shareholder." Yet he had applied for an allotment of shares, had signed a receipt for a dividend, and had appointed a proxy. There never was here, as in *Lord Belhaven's Case* ⁽³⁾ a real contest between the company and the party whether he had been in fact a shareholder. In this case that fact was too plain to be doubted. He claimed to be released by the act of the directors from his character of shareholder, but they never possessed the power so to release him. Even

⁽¹⁾ Law Rep., 3 Ch. Ap., 592.

⁽²⁾ 2 De G. M. & G., 522.

⁽³⁾ 3 De G. J. & Sm. 41.

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if the Chippenham arrangement could be treated as conferring on them such a power Dixon could not be said in any way whatever to come within the terms of that arrangement. He was neither at law with the company, so that the directors, to save the company from the expenses of litigation, might enter into a compromise with him, nor had he incurred a forfeiture of his shares by any violation of the terms of the deed of settlement, or, at all events, no forfeiture of his shares had been declared on that ground. One or the other of these things was shown by Lord Cranworth in *Spackman v. Evans* ⁽¹⁾ to be absolutely necessary to enable a shareholder to be, under the Chippenham arrangement, treated as released from liability. A shareholder was a partner, and could only be released from the partnership in accordance with the provisions of the deed of 612] partnership. Dixon's conduct showed that he had accepted the shares; and when afterwards he wished to get rid of them he allowed delay to occur, and did not give the directors clear and express notice of his repudiation of them. He was bound by his acceptance of them, as the consignee of a cargo would have been: *Chapman v. Morton* ⁽²⁾. The doctrine there stated is amply confirmed by the cases quoted in Lindley on Partnership ⁽³⁾.

As to whether he was a shareholder or not, *Elkington's Case* ⁽⁴⁾ shows that the application for shares and an allotment of them are sufficient to constitute the applicant a shareholder. And this is so especially with regard to third persons whose conduct is likely to be affected by the belief that a particular person has become a shareholder in a particular company: *Davidson's Case* ⁽⁵⁾. It is so even with regard to persons who hold shares upon trust. In *Chapman and Barker's Case* ⁽⁶⁾ a person who held shares, though merely a trustee, was treated as liable as a shareholder to the creditors of the company, though what he paid to them he might ultimately recover against the company itself. Here Dixon might have a right as against Wilkie, but he was clearly liable to the company. As to *Belhaven's Case* ⁽⁷⁾, there was much argument in that case on the question whether he ever was a shareholder, and on that which was a question of fact, the decision turned. That circumstance renders it inapplicable here. The facts here show that Dixon assumed the character of a shareholder, and his delay after he knew that Parliament had not made the company one of limited liability, is an answer to his present claim for exemption. His own conduct has fixed

⁽¹⁾ Law Rep., 3 H. L., 188.

⁽²⁾ 11 M. & W., 534.

⁽³⁾ Page 187.

⁽⁴⁾ Law Rep., 2 Ch. Ap., 511.

⁽⁵⁾ 3 De G. & Sm., 21.

⁽⁶⁾ Law Rep., 3 Eq., 361.

⁽⁷⁾ 3 De G. J. & Sm., 41.

the liability upon him, and the directors had no authority to declare his shares cancelled.

Sir R. Baggallay replied.

LORD WESTBURY :

My Lords, this is an appeal from a decision of the Lord Justice Giffard, sitting alone on behalf of the Court, whereby he has ordered the appellant's name to be put upon the list of the contributories *of this company, and in doing so he dis- [613 charged an order to the opposite effect made by the Master of the Rolls.

The company has been an unfortunate one. This is the fourth or fifth appeal which your Lordships have had to decide arising out of the affairs of this company. But there is this distinction between the present appeal and the former appeals, that in the former appeals there arose cases where the person who resisted being made a contributory, at the same time admitted that he had originally been a shareholder in the company. There was no contention in those cases as to a right to have the name withdrawn *ab initio* from the list of shareholders of the company. The present appeal resembles more, or, rather, falls within, the same class as, *Lord Belhaven's Case* ⁽¹⁾, the contest here being, on the part of the appellant, that he never was originally a shareholder in the company.

The grounds stated on the part of the appellant in support of this appeal are three. He contends, first, that he entered into a conditional contract only to take shares in the company, that that condition was never fulfilled, and that, therefore, there never was a complete agreement on his part to become a shareholder. Secondly, he contends that if he did become a shareholder, or might have been required to complete his character of shareholder, a question arose between him and the company as to his right not to be regarded as a shareholder, and that this question was one which, under the deed of settlement, the directors had the power to compromise and to settle, and that they did *bonâ fide* compromise it; and that one of the terms of the compromise was, that his intended shares should be annulled or cancelled; that this was done *bonâ fide*, and he was thereby relieved from all obligation to the company. Thirdly, he has contended that inasmuch as his name ceased to be upon the register of shareholders from and after the year 1849; whereas the order for winding up this company was not made until the month of May, 1861, the intervening lapse of time, during which the register presented no trace of his being a shareholder and the contract for annulling his shares appeared in the books of the company, renders it unjust that the Court should

(1) 3 De G. J. & Sm., 41.

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614] *now review that transaction and hold him to be a shareholder, and therefore a contributory to the company.

My Lords, I have mentioned these three grounds, not because I deemed it necessary to invite your Lordships' attention to all of them — for in my own judgment the second ground is the one on which it is desirable that your Lordships' judgment should be based — but I mention them for the purpose only of discriminating and laying them aside; giving no opinion with regard to the legal and true effect of the questions so raised by the first and third points of the case presented by the appellant. Confining, then, our attention to the second point, namely, whether there was a power in the directors to compromise, and whether there was a *bonâ fide* settlement by compromise within the authority given to the directors of the company, it is necessary to state in a few words the facts of the case, about which there is no conflict of evidence or dispute between the parties.

Now, my Lords, it appears that this company having been formed in the year 1847, a gentleman of the name of Wilkie was, in the year 1848, the manager and general agent of the company in Scotland. The present appellant appears to have been the owner or occupier of a large estate in Scotland, and to have been on friendly and intimate terms with Mr. Wilkie, the agent. By the deed it was contemplated that an extraordinary board, or board of extraordinary directors, should be formed for the management of the affairs of the company in Scotland; and the original application to the appellant was made by Mr. Wilkie in a request that he would become one of the extraordinary directors. It likewise appears that Mr. Wilkie was desirous that the appellant should be the holder of some few shares in the company; and it seems that, with the consent of the appellant, Mr. Wilkie entered his name as the subscriber for ten shares in the company. The account given is this: that the appellant, as it appears, objected to take shares in the company, inasmuch as there was at that time, according to law and the constitution of this company, no limit on the liability of the shareholders. The appellant appears, therefore, to have said to Mr. Wilkie: "You may enter my name if you will give me this assurance, that until an Act of Parliament shall be obtained limiting the liability of the shareholders I shall not be
615] *required to do anything; neither to pay anything nor to sign the deed of settlement; and, in fact, that I shall not be a responsible shareholder until an Act of Parliament limiting the liability shall have been obtained." Mr. Wilkie, on that understanding, entered the name of the appellant as a subscriber, and he was set down on the register of shareholders as the registered holder of ten shares.

Nothing appears to have been done by the appellant for some time. We find, however, that he gave a proxy to Mr. Wilkie, that is, at Mr. Wilkie's request, to a gentleman of the name of Fenton, with reference to the appointment of the board of extraordinary directors. It seems also that on a dividend being declared by the company of trifling amount, the money was received by Mr. Wilkie; but, apparently at the request of Mr. Wilkie, the appellant signed the receipt. No difficulty seems to have arisen. He was never called upon to execute the deed of settlement, and no reluctance was manifested on the part of the appellant until he received a call letter from the secretary of the company, desiring him to pay certain calls upon the ten shares which appeared to be standing in his name. To the first letter, it seems, he paid no attention, but upon a second letter coming with a second call, he appeals at once to Mr. Wilkie; and the language of his appeal is very material, because he states in his letter to Mr. Wilkie the facts which had previously occurred, and appeals to Mr. Wilkie to interfere between him and the board of directors, and to relieve him from the position of shareholder. The language of the letter is material, because the question here arises, whether the appellant represented his case as one on which he might fairly claim to have his name withdrawn from the list of shareholders. It does not matter, for the purpose of your Lordships' decision on this point, whether the appellant's claim was in all respects fully justified by law if it had been then resisted. It is only material to show that he urged legal grounds, or rather equitable grounds, for the purpose of having his name withdrawn from the subscription list, and that those grounds were in all respects in conformity with the facts. His language is most express. He tells Mr. Wilkie: "You will recollect at the time you put down my name, and paid a deposit, that you distinctly stated to me that you wanted my name for the purpose of appearing in a list of *extraordinary directors in Scotland, when such [616 should be advertised, and when an act of incorporation was got, limiting the responsibility of the shareholders, and that until that was got you would not ask me to sign any contract, or consider me responsible as an ordinary shareholder." He then says: "I will be obliged if you will explain these circumstances to the board, if you have not done so already, and set the matter at rest. I may remind you that you put my name down and paid the deposit yourself, and you have never asked me to repay you the amount, whatever it is. I wish well to the company, and have uniformly insured my stock with it, but I do not think, under the circumstances, I can fairly be held a responsible shareholder." Now, that is a very distinct state

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ment that there was no final concluded agreement, that he had depended upon a certain assurance being fulfilled as to the shareholders' responsibility, and that he had agreed to take shares when that assurance was fulfilled, and not till then. It is a statement, therefore, clearly and distinctly of an equitable right to have what had been done by Mr. Wilkie undone, because the assent of the appellant was founded absolutely upon the condition that a limited responsibility should be attached to the shareholders in this company before he would consent to become a shareholder therein.

Mr. Wilkie appears to have acted in a very straightforward manner, and at once to have communicated with the board of directors, and he tells that board the facts of the case almost in the same terms. In his letter of the 2d of March, he says: "this gentleman's name appears in the list of shareholders, but as he considers he is not properly so, it is necessary for me to explain how he stands. For this purpose I enclose you a copy of a letter he wrote me after the bill was withdrawn from Parliament. This letter I had before me while attending our general meeting in the beginning of November last." That was a meeting of great importance, in which the shareholders were gathered together with a view of considering the terms of the proposed agreement by which some shareholders should be permitted to withdraw. He then apologizes for not having, through forgetfulness, produced the appellant's letter on that occasion. He says distinctly: "I cannot deny what Mr. Dixon states as the terms upon which he allowed me to retain his name 617] as a shareholder on the list. I have never *asked him to repay me the deposit, and did not consider myself entitled to do so until we got an act limiting the shareholders' responsibility. It was on this condition that I obtained his consent to allow his name to remain after I had put it down, and from this also that I did not receive his signature to the deed of agreement." By that I suppose he means the deed of settlement of the company.

Now it being the essence of a transaction of this kind that there should be a complete contract by the shareholder to take shares, there certainly never was, in that sense, a contract by this gentleman. But it is not material to consider that, with a view to deciding this case. It is material only to consider whether this gentleman had not fair and reasonable grounds, and has not stated here fair and reasonable grounds, for being relieved from the engagement into which, through the agency of Mr. Wilkie, he was made to enter.

My Lords, the directors, on the other hand, by their secretary, appear to have drawn a distinction between liability in law

and liability in equity, and to have considered that this gentleman was liable in law to pay the calls; and they therefore said: We will commence an action against you for these calls unless they are paid. There was a repetition, therefore, of the application to the directors, and that was farther confirmed by a representation of Mr. Wilkie, who, in addition to the equity of the claims of the appellant, urged this, that it would be expedient for the company to give way to the claim of exemption, because otherwise the agency of Mr. Wilkie in obtaining farther shareholders in the company would be exceedingly limited, and his credit with people in general would be very much impaired, if the promise he gave to the appellant was disallowed and refused to be performed by the company.

Under these circumstances, those terms were agreed upon, that £40 should be paid, being the amount of the calls that had hitherto accrued due upon the ten-shares, entered in the name of the appellant, and that thereupon the shares should be cancelled. Now, my Lords, we must recollect that this agreement was come to by the directors of a company which was then in full currency and operation. It was a concern the benefit of which depended *undoubtedly upon its being carried on [618 without any transaction that might justify complaint and discredit being cast upon the company. The question is, whether this agreement was not within the power of the directors? I should be almost inclined to think that they would have such a power without the necessity of seeking any distinct authority beyond their deed of settlement. But it is unnecessary to press that, because there is a distinct authority in the deed of settlement, which is directly applicable, as I read and construe it, to the case before your Lordships. By the 164th section (¹) (I read it shortly), it is declared that it shall be lawful for the board of directors to discharge any debts or claims owing by or made against the company upon any evidence they shall think proper, and to enter into or make any compromise or composition with respect to any claims made against or owing to the company.

Now, my Lords, here is a case in which the directors were asserting their title to receive a sum of money from the appellant, and to hold and bind him to it as being on the list of shareholders. On the other side, the appellant was in the condition of a man who could say, and did say, I have been led into permitting my name to be used by your agent on his distinct assurance, upon a precedent condition, which, whilst it remained unfulfilled, would prevent any contract arising between me and you. That there was that condition your agent himself

¹ See the observations of Lord Cranworth upon this section of the deed of settlement in *Spackman v. Evans*, Law Rep., 3 H. L., 168.

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testifies. That it has not been fulfilled is, of course, a thing well known. Therefore no contract has arisen between us, and you have no right to place your hand upon me. In that state of things, the case certainly comes within the express meaning of the words of the clause I have read.

In dealing with a compromise, always supposing it to be a thing that is within the power of each party, if honestly done, all that a court of justice has to do is to ascertain that the claim or the representation on the one side is *bonâ fide* and truly made, and that on the other side, the answer, or defence, or counter claim, is also *bonâ fide* and truly made. I mean by *bonâ fides*, the truth of parties, and above all this, that the compromise is not a sham, or an instrument to accomplish or to carry into 619] effect any ulterior or *collateral purpose, but that the thing sought to be done is within the very terms of the compromise — that all that the parties contemplate and desire to effect and to deal with is, whether the claim on the one side or the defence on the other side shall be admitted or not; or whether, if both things are *bonâ fide* brought forward, there may not be some concession on the one side, and some concession on the other side, so as to arrive at terms of agreement, which, if honestly made, is an honest settlement of an existing dispute. That is the characteristic of a compromise, and if it be not manifestly *ultrâ vires* of the parties, it is one that a court of justice ought to respect, and ought not to permit to be questioned.

My Lords, I find all those elements in this case. I think there have been great truth, great sincerity, and great fairness, on the part of the appellant. On the part of the agent of the company also there have been great candor, great truth, and great sincerity in meeting the claim made by the appellant. There is not the remotest suspicion of any collusion between the two. There is not the remotest hint, or ground for believing, that it was to accomplish any ulterior purpose that this was done; and there is not, so far as I can see, any other mode by which the directors could carry this into effect than the mode which they adopted of cancelling and of annulling, I will not say the shares, but the contract, or rather, the apparent contract, which was on the books of the company, but which in reality never was made or entered into.

I think, therefore, that this case stands wholly independent of those cases which have been decided. *Lord Belhaven's Case* is a much stronger case than anything that I ask your Lordships to decide now. How the decision in *Lord Belhaven's Case* was arrived at, it is not necessary to inquire; but undoubtedly if Lord Belhaven was justly relieved from a deliberate contract

which he entered into, and which was perfected, there is much greater reason for relieving the appellant from the completion of a conditional contract which he was induced to enter into, and which as the condition was not performed, in law and in fact, never became a binding contract.

My Lords, under these circumstances, although you would be slow to encourage persons to come here, after a winding up order has been made, to bring forward claims which they might have *brought forward but did not, during the [620 currency of the company, yet there can be no reason in the world why you should hesitate to give effect to a just, a reasonable, and a truthful agreement, *bonâ fide* entered into many years before it was contemplated or supposed that this company would be reduced to insolvency, and would become the subject of a winding up order. That is the case in the present instance. I think it is very much to be regretted that the order was made, and your Lordships, I think, will not hesitate about discharging that order. Therefore we must, I submit to your Lordships, reverse the order of the Lord Justice, and in lieu thereof direct that the petition of appeal presented to the Lord Justice be dismissed, and dismissed with costs.

My Lords, I regret very much that we do not adopt the very wholesome rule of giving the appellant who succeeds the costs of the appeal to this House. It is very often a sort of defeat when the appellant succeeds after a long litigation. I should be very glad if your Lordships could bring this case within an amended rule, but if you think you cannot do so by reason of the novelty of the proceeding, then all that we can do is to make an order dismissing the appeal below, giving the appellant his costs before the Lord Justice, I think he had his costs before the Master of the Rolls.

With regard to the official liquidator, who has done his duty and no more than his duty, and whose counsel have very ably stated his case for the benefit of those who are absent, he will be entitled to have his costs of this appeal, and of course the costs of the proceedings below, out of the estate.

LORD COLONSAY entirely concurred.

LORD CAIRNS :

My Lords, it is quite clear that the late Lord Justice Giffard (whose name I cannot mention without at the same time expressing my deep sense of the great loss which the country has sustained by being deprived of his most judicial mind) would have been very glad if he could have seen his way to affirm the decision of the Master of the Rolls in this case. But the Lord Justice thought that he was hampered by some of the decisions

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621] which have been *arrived at in the case of this company, and was prevented by those decisions from upholding the order made below.

My Lords, I cannot agree in that view of the case. I think that there is none of the decisions which will in any way be infringed upon by the order which my noble and learned friend has proposed to your Lordships to make.

My Lords, I view this case as an extremely simple one. I am disposed to hold that after what took place in the year 1847, Mr. Dixon was undoubtedly a shareholder in the company, and if in that state of things, there had come a winding up of the company, such as has now taken place, it may very well be that in that position he would have ranked as a shareholder and contributory under the winding up, and that there would have been no means of altering that position. That might have been so at that time. But, my Lords, it appears perfectly plain (without going through the narrative, which has been exhausted by my noble and learned friend), upon the testimony of Mr. Dixon, and upon the evidence of Mr. Wilkie, the agent, which we have through the medium of his letters, that Mr. Wilkie obtained the consent or the acquiescence of Mr. Dixon to his assuming the position of a shareholder upon a distinct promise that the company would obtain an Act of Parliament limiting the liability of the shareholders, and that until that was done, the company would either exact no payment or liability from Mr. Dixon, or would hold him harmless against any such payment or liability. That state of things went on for some time. Mr. Dixon executed a proxy and signed a receipt as for a small sum paid by way of dividend. Neither of those acts was, in my judgment, inconsistent with the state of facts to which I have in the first place referred. In the course of the year 1848, it appears that the company made an effort to obtain an Act of Parliament, but the effort failed. In that same year two successive applications were made to Mr. Dixon for payment of calls, in the latter instance proceedings were threatened. He then appealed to Mr. Wilkie. The promised Act of Parliament not having been obtained, he reminded Mr. Wilkie of the agreement which had been come to, and he requested Mr. Wilkie, not as a matter personal between himself and Mr. Wilkie, to hold him harmless, 622] but to state the *facts to the directors, and to call upon them to act according to the agreement which had been entered into between himself and Mr. Wilkie. After a little accidental delay of a few months, Mr. Wilkie took that course; he forwarded the letter to the agent of the company in London requesting him to call to it the attention of the directors, and confirming and enforcing every word that Mr. Dixon had said.

It was accordingly called to the attention of the directors. Mr. Wilkie, in a subsequent letter, pressed upon them how important it was that it should not be noised abroad in Scotland that the directors were unwilling to act upon the representations made by their authorized agent in Scotland; and this had such an effect upon the directors that they authorized their secretary to communicate to Mr. Wilkie that, upon the payment of the call of £4 per share, Mr. Dixon would be relieved from liability, and his shares would be cancelled.

Now it is not necessary for your Lordships narrowly to scrutinize what would have been your decision if this case had been presented to your Lordships for judgment at that time. It is quite sufficient for me to say that there were, in this state of circumstances, the elements of a fair compromise of a disputed right. There was a very plausible ground for contending, certainly in justice, and very probably in equity, that if Mr. Dixon had at that time gone to his legal adviser, his legal adviser would have recommended him to take steps which would have resulted in a successful claim as against the company to take his shares in some way off his hands, or to indemnify him against any liability which he might lie under to outside creditors in respect of those shares. But I repeat, without scrutinizing whether that would have been the decision arrived at or not, it appears to me it was a fair case to urge on the part of Mr. Dixon, and a fair case for compromise on the part of the directors. And, my Lords, I do not think it was the less a fair case for compromise because the matter had not gone to the length of a letter from his solicitor or legal agent, and because upon the mere representation being made to the directors they saw the justice of what was demanded, and, without much correspondence, agreed to the arrangement that was proposed. Beyond all doubt the directors had authority to compromise, *and if your Lordships are satisfied, as certainly I am satis- [623 fied, that there was here a case containing all the elements for a compromise, and that the compromise was entered into *bonâ fide*, truthfully, and really, not for any sinister object, or for the purpose of disguising under the name of a compromise a different transaction, one *ultra vires* of the directors; if, I say, your Lordships are satisfied of this, as I certainly am satisfied, your Lordships have, as it appears to me, ample ground for holding that that compromise should not, after this lapse of time, be disturbed. I therefore entirely agree with what has been proposed, namely, that the order made at the Rolls should be restored, and that Mr. Dixon's name should be taken off the list of contributories.

My Lords, as to costs, I quite agree with what has been said by my noble and learned friend. I am sorry to say that these

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victories in your Lordships' house are often accompanied with an amount of cost to the successful party which is very much to be lamented. The only way in which the appellant here could be indemnified would be by giving him his costs of appeal out of the estate; but as it appears to me that that has not been done, so far as I am aware, on any other occasion under the winding up acts, and however wholesome such a practice might be, I think it would be dangerous for your Lordships to adopt it on this occasion. I think that all that your Lordships can properly do in this case is to hold that the appellant should have his costs of appeal before the Lord Justice, and that nothing should be said with regard to the costs of this appeal, except that the official liquidator should have his costs out of the estate.

Ordered that the order of Lord Justice Giffard, of the 5th of November, 1869, be reversed; that the appeal upon which the said order was made be dismissed; and that the costs of Dixon and of the official manager, in respect of the said appeal, be paid out of the assets of the company: And that the order of the Master of the Rolls of the 26th of July, 1869, ordering that the name of the appellant be removed from the list of contributors, and that the costs of Dixon, of the said official manager and of the creditors' representative, in respect [624] of the application *upon which the said order of Master of the Rolls was founded, be paid out of the assets of the company, be affirmed: And that the costs incurred by the said official manager in respect of this appeal to this House be paid to him out of the assets of the said company; And that the cause be remitted to the Court of Chancery to do therein as shall be consistent with this judgment.

Lords' Journals, 10th May, 1872.

Solicitors for the Appellant: *Kingsford & Dorman.*

Solicitors for the Respondent: *Horn & Murray.*

Where capital stock notes were given for the purpose of organizing a mutual insurance company and used as such, an agreement made with the agent procuring them, that after they are so used they shall be surrendered, is invalid and notwithstanding the directors of the company after its organization surrender the notes the maker is liable thereon to a receiver appointed in a dissolution of the corporation. *Tuckerman v. N. R. Brown*, 11 Abb. Prac. Rep., 389, affirmed, 33 N. Y. Rep., 297; *White v. Haight*, 16 N. Y. Rep., 321;

Tuckerman v. M. L. Brown, 28 How. Prac., 109, affirmed by Court of Appeals Oct. 1866; *Brown v. Appleby*, 1 Sandf. Sup. Court Rep. 170, affirmed by Court of Appeals, 4, Sandf. Chy., 591, note; *Sagory v. Dubois*, 3 Sandf. Chy., 166; *Brown v. Hill*, 1 Sandf., 629; *Bell v. McElwain*, 18 How. Prac., 150; *White v. Foster*, 18 How. Prac., 151; *Hart v. Achilles*, 28 Barb., 577; *Clem v. New*, 19 Ind., 488; *Hubbard v. Briggs*, 31 N. Y., 518; *Northrop v. Bushnell*, 38 Conn., 498.

Where, however, the note never formed

part of the capital stock, but was a subsequent or guaranty note, and the charter authorized the surrender of such notes upon payment of a proper proportion of all losses and expenses and the maker in good faith paid all that was believed to be due and surrendered his policy, it was held that the surrender was valid and the maker was discharged. *Hyde v. Lynde*, 4 N. Y., 387.

So where a capital stock note has been paid in full by premiums paid by the maker and others upon policies and

by agreement applied upon the note. *Emmet v. Reed*, 4 Sandf., 229. See notes 1 Eng. Rep., 611, 3 Eng. Rep., 28.

A suit may be brought by a judgment creditor against the company and its stockholders to compel such stockholders to pay the balance due on their several subscriptions and they cannot defend, on the ground that their subscriptions were obtained by fraud and misrepresentation of an agent of the company. *Ogilvie v. Know, Ins. Co.*, 22 How. U.S., 380.

[Law Reports, 5 House of Lords, 624.]

June 6, 1872.

THE MARINE INVESTMENT COMPANY and COFFEY and others,
Appellants; and
T. SNAITH HAVISIDE and W. CRIBB, Respondents.

Stamp—Secondary Evidence of a Document.

The burden of proving an instrument to be unstamped lies, in the first instance on, the party who objects to its production on the ground that it is unstamped. Where there is no evidence on either side it will be presumed to have been stamped.

But when once satisfactory evidence has been given that at a particular time the instrument was unstamped, there is an end of any presumption of law in favor of its having been stamped, the onus of proof is shifted, and the party who relies on the instrument must prove it to have been duly stamped.

THIS was an appeal against an order of Lord Chancellor Hatherley, dated the 21st of December, 1870, by which a decree of Vice Chancellor James, dated in January, 1870, had been reversed.

In the year 1859 one Robert Taylerson was the owner of letters patent for an invention for improvements in shipbuilding, and he was also the owner in fee of a shipbuilding yard and premises situated at Ladyburn, near Greenock, in Scotland. By a bond and disposition executed in the Scotch form dated the 13th of May, 1859, and registered in the Registry of Sasines for Renfrewshire *and the Regality of Glasgow, this pro- [625] perty was mortgaged to a person named Bourne to secure a sum of £3000, the unpaid balance of the purchase money agreed to be given for it, the original sum having been £4000 and only £1000 having been paid. The sum for which the mortgage was executed was to bear interest at 5 per cent.

By a like bond and disposition of security executed in the Scotch form, dated the 22d of June, 1859, and registered the 5th of July, 1859, Taylerson bound himself to repay to the re-

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spondent, Thomas Snaith Haviside, a sum of £1150 with interest, and mortgaged the same premises to secure payment of this debt.

By an agreement dated the 2d of September, 1859, after taking credit for the value of a ship then assigned to Haviside, Taylerson acknowledged himself indebted to Haviside in a sum of £4350, in addition to the £1150 already mentioned.

By a bond and disposition of the same date Taylerson secured upon his shipbuilding yard the sums thus acknowledged to be due.

By an indenture dated the 20th of November, 1859, Taylerson mortgaged the patent to Haviside for £1,000.

In the year 1862, one William Cribb was proposed to become a partner of Taylerson. Negotiations were pending for some time on this scheme of partnership, and it was alleged that for the benefit of Taylerson (on account of friendship for him) Haviside had written a letter consenting to release his mortgage on the premises at Ladyburn, that being one of the inducements for Cribb to enter into partnership with Taylerson.

Cribb did enter into the partnership, quitted it in about a year, and then Gething, Cribb's solicitor, handed over to Sutton, who succeeded Cribb in the partnership, the letter said to contain the undertaking.

In April, 1864, the Marine Investment Company advanced certain sums of money to the partnership of Taylerson & Sutton, and it was agreed that the title deeds of the shipbuilding yard and premises at Ladyburn should be deposited as collateral security for these advances. Taylerson & Sutton when agreeing to this arrangement informed the solicitors of the company that the property was mortgaged to the extent of £3,000 to Mr. 626] Holden, who held the title *deeds as assignee of Bourne, the original mortgagee. It was arranged that this mortgage should be paid off out of the moneys advanced by the company, and the deeds were to be handed over to the company. This was done, the company being assured that there was no other charge upon the premises, and by a disposition in the Scotch form Taylerson, on the 6th of July, 1864, assigned the shipbuilding yard and premises at Ladyburn irredeemably to Coffey and others, the trustees of the Marine Investment Company.

In November, 1864, Taylerson became bankrupt. In investigating the title to the shipbuilding yard and premises upon some proceedings consequent on this bankruptcy, the solicitors for the Marine Investment Company searched the Register of Sasines for the county of Renfrew, and by means thereof discovered the mortgages to Haviside there recorded. Sutton and the other parties being told of this, declared that the premises

were in fact unincumbered, for that Mr. Haviside would, of course, act on the undertaking he had given, and release the mortgage. A search was made for the letter said to constitute this undertaking, but it could not be found, nor could any one swear to its contents, nor was there any known copy of it. Haviside denied that he had entered into any absolute undertaking to release the mortgage, averred that it was an undertaking conditional on Cribb executing a charge on the ship-building yard, which condition had never been performed; and farther, that the undertaking was delivered to Cribb unstamped.

On the 19th of June, 1864, a bill was filed by the Marine Investment Company and Coffey and others against Haviside and Cribb, praying that a proper release might be decreed to be executed by Haviside, and that he and Cribb might be decreed to do and concur in all necessary acts and deeds for the purpose of having the entry in the Registry of Deeds in Scotland vacated, the Marine Investment Company being willing to pay the expense thereof; that proper inquiries might be made; that Haviside might be restrained from transferring the mortgage debt; and for general relief. Answers were put in, Haviside denying any positive undertaking to release, and alleging that all that he had proposed to do was for the benefit of Taylerson and not of his creditors, and insisting that the alleged letter of undertaking should be produced.

Sutton died in 1868.

*In the course of the evidence given in the cause, Mr. [627 Gething, the solicitor to Cribb, and afterwards the solicitor to Sutton, said: "I cannot remember anything as to the contents of the undertaking which I handed to Mr. Sutton. I am sure that it was not stamped while in my possession."

The Plaintiffs (the Marine Investment Company and Coffey and others the trustees) put in among other evidence the bills of costs of Haviside's solicitors (Messrs. Howard & Dollman) of February, 1863, in which were these (among other) entries:

"Drawing undertaking to be given by Mr. Haviside to release mortgage on premises at Ladyburne, and copy."

"Attending Mr. Haviside, obtaining and attesting his execution of assignment and signature to undertaking."

"Attending completion."

"Attending stamping duplicate assignment."

From which evidence, and the belief of some witnesses that with the assignment of the patent there had been an unconditional undertaking to release the mortgage, the right to relief was insisted on.

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The cause came on for hearing before Vice-Chancellor James on the 28th of January, 1870, when, in addition to evidence of the conduct of the parties and proofs of the bills of costs of the attorneys and solicitors, secondary evidence of the contents of the alleged letter of undertaking was tendered. It was objected that the letter itself was not produced; that if produced it would be found to be unstamped, and that consequently as it could not itself be admissible, it was not competent for the Plaintiffs to give secondary evidence of its contents. The Vice-Chancellor thought that on the whole evidence there was enough to show that the alleged undertaking had been given, and, adopting the representation that it was an absolute undertaking to release, he made a decree directing the execution of a release as prayed. On appeal to Lord Chancellor Hatherley the decree was ordered to be reversed. This appeal was then brought.

Mr. *Edward E. Kay*, Q. C., and Mr. *W. W. Karlake*, for the Appellants:

There had been here a simple undertaking to release the [628] *mortgage, and the question was, whether that was not sufficiently proved, or whether, as the letter containing the release had been lost, it was not competent to the appellants to give secondary evidence of it. It is not denied that an instrument of that sort must be stamped. But, when the objection that it is not stamped is made, the onus of proving that objection lies in the first place on the objector. That onus was not here discharged by him. All the presumptions from the evidence of the conduct of the parties were the other way. The document was proved to have been given, and to have passed from one person to another, each being interested in seeing that it was a valid and effectual instrument. The paper was delivered to Cribb in February, 1863, and he held it while he continued in the partnership. He quitted the partnership in February, 1864, and was succeeded by Sutton, to whom Cribb or his solicitor Gething handed over the letter. Mr. Gething's statement amounts to no more than that he did not recollect getting it stamped while it was in his possession. It might have been stamped before. That is the proper meaning to be affixed to his words. But all the proceedings from that time forward showed the belief of the various parties that the release was valid and could be enforced. If, therefore, it was not stamped by Gething while in his possession it must have been stamped after it got into the possession of Sutton. There were in the bill of costs of Haviside's own solicitor two entries which showed that the document had been duly executed [see *ante* p. 627.] The instruments there mentioned had been completed,

and then this instrment had been handed over to the parties interested, and was held by them during the continuance of their interest. There could not be stronger grounds for presumption for the belief that the instrument thus properly executed was put by them into a perfectly legal and formal state, and was in all respects valid. The statement of Haviside in his answering affidavit, "I believe that such letter was not stamped," cannot for one moment be set up against such a presumption.

Then what is the state of the authorities on the subject? The first case is that of *Rex v. Long Buckby* ⁽¹⁾, where parties having acted for years on the belief that certain indentures of apprenticeship were valid, the court adopted the presumption that they had been properly stamped, although evidence was actually given that no proof of the stamping could be found in the records of the Stamp Office. In *Rippiner v. Wright* ⁽²⁾ an agreement had been reduced into writing on paper shown at that time to be unstamped. On a subsequent occasion it was snatched by the plaintiff from the hand of the defendant's attorney; it was afterwards destroyed, and there, no doubt, the court refused to receive secondary evidence of it; but that was because at the time it was snatched from the hands of the attorney it was known not to be stamped, and it was then in the hands of a man whose interest it was that it should not be stamped. That case, therefore, could not affect the present. But in *Pooley v. Goodwin* ⁽³⁾ a written paper authorizing the payment of a sum of money had been given and had been lost; but the defendant having in his own affidavit set out the order itself, secondary evidence of it was allowed, as the court presumed that the stamp had been properly affixed to it. So in *Hart v. Hart* ⁽⁴⁾ it was held that where secondary evidence is admitted to prove the contents of a lost instrument, the court will presume it to have been properly stamped until the contrary is shown. And Phillips' Evidence ⁽⁵⁾ adopts the principle there acted on. In *Smith v. Henley* ⁽⁶⁾ the document had been returned to the hands of the man who did not like and did not wish to be bound by it, and he destroyed it, and there evidence had been given which showed that at the time it got back to his hands it was not stamped. There, of course, no ground existed for the presumption that he who wished to get rid of it would make it a valid instrument; but here the presumption was the reverse, for it was in the hands of men whose interests were to be protected by it, and who would therefore take care

⁽¹⁾ 7 East, 45.

⁽⁴⁾ 1 Hare, 1.

⁽²⁾ 2 B. & Ald., 478. See *Rex v. Castle Morton*, 3 B. & Ald., 588.

⁽⁵⁾ 8th Ed. vol. ii. p. 623.

⁽⁶⁾ 1 Phill., 391.

⁽³⁾ 4 Ad. & E. 94. See *Doe d. Fryer v. Coombe*, 3 Q. B., 687.

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that, it was valid. In *Crowther v. Solomons* ⁽¹⁾ the person who produced the copy admitted that the original was not stamped, 630] otherwise it was said the ordinary* presumption that it was stamped would have arisen. In *Closmadeuc v. Carrel* ⁽²⁾ it was said that the general rule in favor of the presumption that the instrument was stamped could not be disputed. Here the evidence to support that presumption was very strong, for it was Sutton's interest to get it stamped, and from the beginning to the end he acted on the faith of its being a valid and effectual instrument.

Sir *R. Palmer*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Speed*, were for the Respondent, but were not called on.

LORD CAIRNS ⁽³⁾:

My Lords, in this case the bill is filed, in substance, for the specific performance of an agreement to release a certain ship-building property on the Clyde from a mortgage over the property, to which the respondent Haviside was entitled; and two objections are made to the relief sought by the present appellants. The agreement which it is founded upon was constituted by a letter, dated the 24th of February, 1863, and the letter is lost. The first objection is this: It is said that the letter was not stamped. And the second objection is, that the terms of the letter are not proved, and that they were not the terms which are alleged by the plaintiffs' bill. My Lords, the first of these objections has to be disposed of in its proper order; and it will be unnecessary, as it seems to me, and as I shall ask your Lordships to hold, to consider the second question, having regard to the nature of the answer which must be given to the first.

Now, it is not for your Lordships, at this time, to consider whether the fiscal law with regard to the stamping of lost instruments is in the most satisfactory state possible, or not. It is said that if an instrument be lost, and if a copy of it can be produced, or if the words of the instrument are so accurately remembered that they can be set down in writing, the copy in writing can be taken to the Stamp Office, and on the payment of the proper penalty it may be stamped. But if there is no copy, and the words cannot be set down in writing, no 631] penalty can be received* and no stamp affixed. I repeat, assuming that to be so, it is not for your Lordships now to consider whether that state of the law should be amended. It is for this House, at this time, simply to administer the law.

My Lords, the law with regard to the presumption to be

⁽¹⁾ 6 C. B., 758. ⁽²⁾ 18 C. B., 36. of the Lord Chancellor, Lord Cairns

⁽³⁾ The appeal being from a decision first addressed the House.

made as to the stamping of lost instruments appears to me to be stated correctly in a sentence in the book of Mr. Taylor on Evidence, in which all the authorities which have been referred to to-day are collected. Mr. Taylor says ⁽¹⁾: "If secondary evidence is tendered to prove the contents of an instrument which is, either lost, or retained by the opposite party after notice to produce it, the Court will presume that the original was duly stamped unless some evidence to the contrary be given." The cases which have been referred to at the bar are here collected in a foot note. They are *Hart v. Hart* ⁽²⁾ *Crowther v. Solomon* ⁽³⁾ *Pooley v. Goodwin* ⁽⁴⁾, *Rex v. Long Buckby* ⁽⁵⁾, and *Closmadeuc v. Carrel* ⁽⁶⁾.

Now, my Lords, I take it to be clear that if an instrument is lost, and if there should be no evidence given respecting it on one side or the other, the presumption which ought always to be made, and which always would be made by the Court, would be that the instrument was properly stamped. There is no reason for the court to adopt any other conclusion, and that is the conclusion that would be adopted. The facts, however, of this case are these: — The letter which is founded upon by the plaintiff was dated the 24th of February, 1863. It was written, for there is no doubt there was such a letter, and it was handed over upon the occasion of the formation of a partnership as to the ship building premises between Mr. Taylerson, the original owner and Mr. Cribb. It is said that Mr. Cribb would not have entered into the partnership unless that letter had been written and handed over. Mr. Cribb continued in the business until the month of February, 1864. As to what passed at the time the letter was written, the evidence of Mr. Dollman, the solicitor of Mr. Haviside, who gave the letter, is this, he says: "I have examined the books of my late firm, and I cannot find any entry, charge, or disbursement *relating to the stamping [632 of any such undertaking; and I verily believe that the same (if given) was not stamped at the time it was delivered to the said Messrs. Keighley & Gething as aforesaid." But Mr. Gething, who was the solicitor of Mr. Cribb, the person for whose benefit the letter was written, says what is still stronger. He says: "As to what was to be done by Mr. Haviside, I cannot remember anything as to the contents of the undertaking which I handed over to Mr. Sutton. I am sure that it was not stamped while in my possession." I do not pause to consider a suggestion that was made that that might mean that no stamp was put on it during the time it was in the witness's

⁽¹⁾ "On Evidence," 4th Ed. p. 153.

⁽⁴⁾ 4 Ad. & E. 94.

⁽²⁾ 1 Hare, 1.

⁽⁵⁾ 7 East, 45.

⁽³⁾ 6 C. B. 758.

⁽⁶⁾ 18 C. B. 36.

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possession, whereas it might have been stamped before it was in his possession. The witness was not cross-examined upon that subject; and I think the words must be taken according to their natural meaning, namely, that it had been an unstamped document all the time that it was in the possession of Mr. Cribb, and when Mr. Gething handed it over to Mr. Sutton. It remained in his possession during the whole time that Mr. Cribb was a member of this partnership. As I have said, the letter was for the benefit of Mr. Cribb. Mr. Cribb was the person interested in having it stamped; and yet it is clearly shown in evidence that, during all that period at least, Mr. Cribb did not have the letter stamped.

Mr. Cribb retired from the partnership in February, 1864; and a Mr. Sutton took his place, and became from that time Mr. Taylerson's partner. It was of course, for the benefit of Mr. Sutton that this letter, if it was of the character that is alleged, should be handed over to him, and be preserved by him. Mr. Gething appears to have been not only the solicitor of Mr. Cribb but also of Mr. Sutton, and he states that he continued to be the solicitor of Mr. Sutton in the matter of this particular property (which is called the Ladyburn property), after Mr. Sutton had become a partner down to the time of Mr. Sutton's death. Mr. Gething farther states that the letter remained in his possession for some months after the new partnership between Sutton and Taylerson was formed, and that then he, the solicitor of Mr. Sutton, handed over the letter, still unstamped, to Mr. Sutton. And Mr. Gething does not suggest that, continuing as he did, to be the solicitor of Mr. Sutton down to the time of Mr. 633] Sutton's death, *he, at any time, knew or heard of the stamping of the document. When the document was lost we do not know. It may have been lost immediately after it was handed over to Mr. Sutton, or it may have continued in Mr. Sutton's possession for some time after, and have been lost either before or after the time of his death. As to that there is no evidence whatever. Farther than that, it does not appear that, while in the possession of Mr. Sutton, this document was ever in any way used or produced or acted upon by Mr. Sutton.

Mr. Sutton, and his partner Mr. Taylerson, had occasion in the month of June, 1864, to apply to the banking company, now represented by the appellants, and to ask for a loan of money. They obtained that loan of money upon a deposit of the title deeds of the Ladyburn property. They appear to have stated to the bankers that the Ladyburn property was unincumbered, except by an earlier mortgage, which was paid off on the occasion of the loan. But it is not suggested that the bankers ever knew of the mortgage or mortgages possessed by Mr.

Haviside over the Ladyburn property; much less that they knew that any letter of the kind alleged had been given by Mr. Haviside with regard to this mortgage, or that that letter was in any way produced to the bankers. It does not appear, therefore, that Mr. Sutton during his life ever used or produced this document.

My Lords, in that state of things it appears to me that it becomes a question of evidence — a question of the just and fair inference to be drawn from the facts. This is not a case in which, there being no evidence on either side, your Lordships would presume, according to the well known rule of law, that the instrument was stamped. It is a case in which evidence, and a considerable body of evidence, is produced by those who maintain that the instrument was unstamped — and the question is whether that body of evidence so produced is rebutted by those who claim under the instrument, and is displaced as regards the question of fact. [His Lordship went through the evidence on this point very fully.] In this case there was no evidence, as in one of the cases cited in argument, *Closmadeuc v. Carrel* (¹), to show an attempt to get the letter stamped. But unless it be the law that after a *party has proved that an [634 instrument was unstamped on its execution, and continued unstamped for a considerable time after its execution — unless, I say, it be the law that in such a case the mere possibility that it might have been stamped at a subsequent period is, without more, sufficient, it seems to me your Lordships should hold that in this case there is evidence demonstrating that, down to the time to which I have referred, the instrument was unstamped; and there being no evidence to lead us to believe that it was stamped at any time subsequently, the just conclusion is, and must be, that it continued to be, as it was at the beginning, an instrument unstamped.

My Lords, it is always in some sense a disagreeable, and sometimes an invidious, thing to hold that a case should fail for want of a stamp being affixed to an instrument; and there are cases in which such a result, arising from accident, must be regarded with painful regret. In this case it does so happen, that if there is a failure in the relief to which the appellants would otherwise be entitled, they have no one but themselves to blame for it. If the bankers, at the time they were applied to in 1864 for that loan of money, had done what bankers reasonably should have done, if they had made due inquiry with reference to this property situate in Scotland, subject to Scotch law, and governed by the principles of Scotch registration, they would have

(¹) 18 C. B., 36.

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found upon the register the mortgage of Haviside, and the finding of that mortgage upon the register would immediately have led them to apply to Mr. Sutton and his partner for explanation. The whole matter was then fresh. If the view of the appellants as to the contents of this instrument is correct, the instrument would then have been produced, and its production would have led to the release of these mortgages. The bankers did not take that step, and the result has been, that when the difficulty arose, the instrument was lost, and no stamp could be affixed to it.

My Lords, under these circumstances, it appears to me that the first objection which is made to this instrument is a fatal one, and that it is altogether unnecessary to consider the other question. I submit to your Lordships, for the reasons I have stated, that this appeal should be dismissed; and I see no reason for advising your Lordships otherwise than that it should be dismissed with costs.

635] *LORD COLONSAY concurred.

THE LORD CHANCELLOR (Lord *Hatherley*):

My Lords, I entertain the same view which has been already so clearly and fully expressed by my noble and learned friend who has advised your Lordships upon this case. The way in which this difficulty has occurred is one in which it often does occur, that the matter was not supposed to be of importance. This is a case in which, of all others, we should most strongly have presumed that the document would have been stamped, if there had not been evidence to the contrary; it must be simply through the neglect of the parties that the stamping was omitted to be done. There is, however, evidence that it was not stamped for a long period—in fact, up to the time when it is traced to the custody of Mr. Sutton, in whose hands it was placed: after that we know nothing more of it. It appears that the same gentleman who acted as solicitor to the person who received the document, continued so to act for some years; and if it had been stamped, would most likely have had knowledge of the fact. I think the authorities go to this extent, that when once you have proved the absence or loss of the stamp the onus is shifted, and the question must be left to the jury upon the evidence that is produced. And if no evidence is produced, then, whatever the consequences may be, you are obliged to retain the conviction that the document was unstamped. And in this case, there being no evidence whatever of the document being stamped, there is nothing to lead us to the inference that

it was ever stamped, I entirely agree with the motion of my noble and learned friend.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 6th June, 1872.

Solicitors for the Appellants: *Kimber & Ellis.*

Solicitors for the Respondents: *Wilkins, Blyth, & Marsland.*

A state of facts once proven to exist are presumed to continue until the contrary is shown. *Sleeper v. Van Middlesworth*, 4 Den., 431; *Rathbone v. Ross*, 46 Barb., 127; *Smith v. New York*, etc., 43 Barb., 228; *Hunt v. Michigan*, etc., 35 How. Prac., 288; *Hunt v. N. Y.*

and Erie R. R., 1 Hilton, 228; *McMahon v. Harrison*, 6 N. Y., 443; *Nixon v. Palmer*, 10 Barb., 175, reversed but on another point, 8 N. Y., 398; *Cooper v. Dederick*, 22 Barb., 516; *Thorp v. Hatch*, 3 Abb. Prac., 175.

[Law Reports, 5 House of Lords, 636.]

June 27, 28, 1872.

*GEORGE OSGOOD Plaintiff in Error; and THOMAS JAMES [636] NELSON Defendant in Error.

Corporate Office—Inquiry by Committee—Hearing of Parties—County Court Acts—"Reasonable"—"Just."

Though a corporation may have by statute a power to remove one of its officers holding a freehold office, the Court of Queen's Bench will see that that power is exercised in a lawful manner, and will interfere if it should not be so. But if exercised in a lawful manner that court will refuse to interfere on the mere ground that the power has not been wisely or discreetly put in force in the particular case.

In the case of removal from office of an officer of the corporation, upon an accusation of inability or neglect of duty, if there has been such evidence given as in an ordinary trial would justify the judge in leaving it to a jury to say, as a matter of fact, whether the accusation was made out, the court will not interfere with the decision arrived at by the corporation.

A corporate body having the power to dismiss one of its officers, holding a freehold office, on complaint against him, referred to a committee of its own body the task of examining into the complaint, and receiving evidence upon it, and reporting thereon. The committee performed this duty. The report and evidence were duly furnished to the inculpated officer, who was then called on for his defence. He was afforded the opportunity of being heard, and counsel was heard for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office:

Held, that this was not a case of delegation of lawful authority, but was a due exercise of that authority by the corporate body itself.

Per LORD COLONSAY: The proceedings in this case were not to be assimilated to a criminal proceeding, but were to be treated in the nature of an official inquiry.

The 13 & 14 Vict. c. 61, gave to the lord chancellor the power to remove from office the registrars of county courts. The 15 & 16 Vict. c. lxxvii. (local), declared the mayor, aldermen, and commons, in Common Council assembled, entitled to appoint the chief clerk of the London (city) small Debts Court, and "for inability or misbehaviour, or for any other cause which may appear reasonable to the mayor and council, to remove" the said clerk. The 19 & 20 Vict. c. 106,

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directed previous county court statutes to be read as part of that statute, and that the chief clerk of a county court should thenceforth be called "the registrar." The 28 & 29 Vict. c. 99 (regulating county courts in general), directed that the chief clerk and chief bailiff of the city court should thenceforward be styled the registrar and the high bailiff, and that the city court should have the same powers, &c., as a metropolitan county court; and it also incorporated with itself all the preceding public statutes relating to county courts:

Held, that the specific enactment in the 15 & 16 Vict. c. lxxvii. (local), as 637] *to the power of amotion from the office of registrar to be exercised by the mayor, &c., in common council assembled, was not taken away by the effect of the general statutes, but still existed in that body:

Held, also, that "reasonable" cause in the Act meant "just cause."

THIS was a proceeding in error upon a judgment in the Court of Exchequer Chamber, which had affirmed a previous judgment of the Court of Queen's Bench (¹).

In June, 1867, a rule *nisi* for a *quo warranto* was granted by the Court of Queen's Bench against Mr. Nelson, to show cause by what authority he claimed to exercise the office of chief clerk or registrar of the Sheriffs' Court of the City of London. It was afterwards settled that an action should be brought by Mr. Osgood to recover the fees of his office, which he claimed to hold as a freehold office, and that the questions intended to be discussed should be raised on a special case, and the decision of them should govern the proceedings in the *quo warranto* information. This was done, and the case stated facts of which the following is a summary:—

The plaintiff (Mr. Osgood) claimed to have been entitled on the 2d of May, 1867, to fill the office of registrar of the Sheriffs' Court of the City of London, having been appointed thereto in the year 1856 by a resolution of the Court of Common Council. At the time he was appointed the title of the office was that of "chief clerk of the Sheriffs' Small Debts Court." He was appointed in succession to a Mr. M. E. Wilkinson, on whose retirement a committee of the Common Council, known as "The Officers and Clerks' Committee," made a report which settled the salary, and set forth the duties of the intended appointee. There were several candidates for the office, and among them were John Robertson Aikman (then chief bailiff of the Court) and George Osgood. The result of the poll was that Mr. Osgood was elected chief clerk by sixty-two to twenty-six votes. Mr. Aikman therefore continued in his former office. The election was, in form, temporary, but Mr. Osgood continued on frequent re-elections to fill the office as then constituted for several years. The name of chief clerk was, subsequently, in obedience to the provisions of 28 & 29 Vict. c. 99, changed to "registrar." In August, 1866, disputes arose between Mr. Aikman and Mr. Osgood — both referred to Mr. Commissioner

(¹) 10 B. & S. 119, where the facts are fully set forth.

Kerr, *who wrote some letters on the subject ⁽¹⁾, and [638 finally the matter came before the lord mayor, aldermen, and commons of the city in common council assembled. It was referred by them in the usual manner to "The Officers and Clerks' Committee." By the members of this committee the matter was investigated: Aikman and Osgood appeared before them. Evidence was taken, and the committee, on the 13th of March, 1867, made a report in which the mode of proceeding on this inquiry was set forth in detail, and the following resolution was stated: "That in the opinion of this committee such irregularities have been disclosed in the offices of the registrar and high bailiff respectively, as seriously interfere with the proper conduct of public business, and that the Court of Common Council be recommended to take such steps as they may deem advisable under the provisions of 'The London (city) Small Debts Extension Act, 1852.'" This report was laid before the Court of Common Council on the 21st of March, 1867. Both parties were furnished with a copy of the report, and had an opportunity of inspecting the short-hand writer's notes of the evidence. Mr. Osgood, on the 28th of March, wrote a letter requesting to be heard by counsel to show cause why he should not be removed from his office of registrar, and the 2nd of May was appointed for that purpose. Before that day, the committee's report, with the various letters and documents, and the transcript of the notes of evidence, were printed in a book a copy of which was delivered to the lord mayor, the aldermen, and every member of the Common Council, and also to Aikman and Osgood. On the 2d of May, Osgood appeared before the Court of Common Council, which had the assistance of the recorder and common sergeant, to show cause against his removal from office. Though personally present, he was represented by Mr. Sergeant Tindal Atkinson as his counsel. After speeches from counsel upon the case as then presented, the Court of Common Council deliberated, and then passed two resolutions, the first of which declared:

"That in the opinion of this court the duties of chief clerk or registrar of the Sheriffs' Court have not been properly discharged by Mr. Osgood." The second resolution was —

*"That this Court, having carefully considered the evidence as to the manner in which the duties of the office of chief clerk or registrar of the Sheriffs' Court have been discharged by Mr. Osgood, is of opinion that reasonable cause exists for his removal from his said office, and the court doth hereby remove him accordingly."

(1) The charge against Mr. Osgood performance of his duties, as set forth was a general charge of neglect in the in these letters.

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Mr. Nelson, the city solicitor was afterwards appointed, *pro tempore*, chief clerk or registrar of the Sheriff's Court, under "The London (city) Small Debts Extension Act, 1852."

The Court of Queen's Bench, on the argument of this case, was to be at liberty to draw any inference of fact which might have been drawn by a jury.

Mr. Osgood contended that he was not lawfully removed from his office, because the office was a freehold office, tenable during good behavior; that he had been removed without reasonable cause; that no definite charge had been made against him, and that he was removed contrary to the statute, for that the power of removal was in the lord chancellor, and not in the mayor, aldermen, and commons of the city (¹).

(¹) The Acts relating to this matter were the following:

The 9 & 10 Vict. c. 95, which instituted the modern county courts. By this act the power of appointing and removing the chief clerk of the court and the high bailiff was vested in the judge of the court.

The 13 & 14 Vict. c. 61, s. 4, the power to remove the chief clerks and high bailiffs of county courts was vested in the lord chancellor.

The 15 & 16 Vict. c. clxvii., entitled "The City Small Debts Extension Act, 1852" (local), was passed with relation to the city of London Sheriffs' Court alone. It introduced certain regulations, and by the 11th section provided: "That every chief clerk to be hereafter appointed shall be an attorney of one of Her Majesty's Superior Courts of Common Law, who shall have practised as an attorney for at least five years, and such clerk shall be appointed by the mayor, aldermen, and commons; and it shall be lawful for the mayor, aldermen, and commons, in case of the inability or misbehavior of the clerk, for the time being, of the court, or for any other cause which may appear reasonable to the mayor, aldermen, and commons to remove such clerk of the court," &c., and to appoint some other person, qualified as aforesaid, to be clerk of the court.

Some other statutes, public and general, were passed on the subject of county courts, and then came the 19 & 20 Vict. c. 108, entitled "An Act to amend the Acts relating to county courts." By the 3d section of this statute it was enacted "That this Act and the Acts passed in the 9 & 10 Vict.

c. 95, and the 13 & 14 Vict. c. 61" [and certain other acts not necessary to be named], "shall be read as one act, as if the several provisions in the said recited acts contained were repeated and re-enacted in this act." The 8th section directed that the clerk of a county court shall hereafter be called "the registrar of the court."

The 28 & 29 Vict. c. 99 (1865), gave an equity jurisdiction to county courts in general, and by sect. 4, enacted that "The judge and officers of the court held under the provisions of 'The London (city) Small Debts Extension Act, 1852,' hereinafter called 'The City Court,' shall respectively have and exercise the like jurisdiction, &c., in all respects, except the power of appointing officers" as a metropolitan county court, "and the chief clerk and the chief bailiff of the city court shall henceforth be respectively styled the registrar and high bailiff thereof," and they were to be paid such additional salaries as the mayor and common council should direct. Sect. 21 declared that "This Act and the Act of the 9 & 10 Vict. c. 95, and any Act amending or altering the same, shall be read and construed as one act, as if the several provisions contained in the said acts referred to, not inconsistent with the provisions of this act, were repeated and re-enacted in this act."

The 30 & 31 Vict. c. 142, intituled "An Act to amend the Acts relating to the Jurisdiction of the County Courts," was passed in 1867. That statute enacted, s. 34, "That this Act and the several Acts specified in Schedule D, to this Act" [among which were 9 & 10 Vict. c. 95, the 13 & 14 Vict. c. 61, the

*The Court of Queen's Bench gave judgment for the de- [640
fendant affirming the lawfulness of the removal, both as to the
right to remove and as to the form of the proceeding, but the
judges suggested doubts as to the sufficiency of the cause of re-
moval. The Court of Exchequer Chamber sustained the judg-
ment, repeating the expression of the same doubts.

The case was then brought up to this House on error. The
judges were summoned, and Mr. Baron *Martin*, Mr. Baron
* *Bramwell*, Mr. Justice *Blackburn*, Mr. Justice *Mellor*, [641
Mr. Justice *Keating*, and Mr. Justice *Brett* attended.

Mr. *Anderson*, Q.C., and Mr. *Gibbons*, for the Plaintiff in
Error:

The dismissal from office here is without authority. There
was no power in the mayor and council to pronounce it. The
power to appoint and remove the registrar is not in them, but
in the lord chancellor. The 13 & 14 Vict. c. 61, vested it in
the lord chancellor, and now, by the effect of the 19 & 20
Vict. c. 108, which relates to all county courts whatever, and
includes that of the city of London, the provision which before
applied to other county courts was made applicable to this one.
That statute was enforced by the 28 & 29 Vict. c. 99, which
assimilated the city court to all the metropolitan county courts,
and changed the names of its chief officers, expressly enacting
that the chief clerk was in future to be designated as the regis-
trar, that being the name already given to that officer in the
other county courts. The intention of the legislature to make
the city court identical with the others was thus plainly shown.
It is true that the 15 & 16 Vict. c. lxxvii. described the mayor
and common council as the persons entitled to remove the
chief clerk, but that was only the declaration of a previously
existing power, made in a local act; but the direct and clear
enactments of the 28 & 29 and 30 & 31 Vict. which were public

19 & 20 Vict. c. 108, and the 28 & 29
Vict. c. 99], "be construed together as
one Act." Sect. 35 enacted "That the
words 'County Courts,' when used in
this Act or any future Act, shall mean
a court held by virtue of the 9 & 10
Vict. c. 95, and shall mean and include
the courts held by virtue of 'The Lon-
don (city) Small Debts Extension Act,
1852,' unless otherwise provided, and
such court shall be holden by the name
of 'The City of London Court,' and shall
be a court of record, and its decisions
shall be subject to appeal in the same
way and on the same conditions as the
decisions of a County Court are subject
for the time being." The rules and

orders of county courts were to be in
force for the City of London Court to the
exclusion of any rules and orders then in
force in that court, and the fees were
regulated. Then came this proviso:
"Provided that nothing in this Act or
in any of the Acts specified in the Sched-
ule D. to this Act shall take away,
lessen, or diminish any of the powers,
rights, or privileges of the judge of the
said Court, or the authority of the mayor,
aldermen, and commons of the city of
London in Common Council assembled
in relation to such Court, or to the judge
or officers thereof, as such powers or
authority existed previously to the pass-
ing of this Act."

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and general statutes, that all the previous county court acts should be incorporated with and read as part of those statutes, put an end to the declaration contained in the local act. If so, then the removal by the mayor and common council is altogether without authority.

But, assuming for argument's sake the power to remove, then the manner in which that power was exercised is irregular. There was no specific charge of misconduct, and in such a case a general charge is not sufficient: *Rex v. The Corporation of Doncaster* ⁽¹⁾; and that case showed, too, that the jurisdiction which pretended to remove the officer ought to be plainly alleged and clearly established. It was not so here. On this latter point, *Rex v. Shaw* ⁽²⁾ was an authority. There the objection to the jurisdiction would have been sustained, but that it was set up 642] at the last moment *by the man who had himself previously acted upon it as valid. Here there was no conduct of that kind which could be treated as binding upon the plaintiff: on the contrary, he had from the first objected, and expressly reserved all his legal rights. In *Rex v. Liverpool* ⁽³⁾, it was held that the foundation of an inferior jurisdiction must be distinctly set forth. Here it had only been assumed to exist.

The court of the mayor, aldermen, and commons was to be treated as a corporation, or as a court of law. If it was to be considered as a corporate body, investigating the conduct of one of its officers who held a freehold office, then it must proceed according to the rules applying to corporate bodies in such cases: rules which the courts of common law have laid down, and the observance of which they have the power to enforce: *Rex v. Cambridge* ⁽⁴⁾. Any disregard of those rules will render the proceedings void, and will do so even in cases in which the courts of law may altogether refuse to take notice of the result of the inquiry. It is true that the case of *Rex v. Cambridge* was the case of a college in a university, but the same principle applies with equal force to a lay corporation.

If the Court of Common Council is to be treated as a court of law, then the charge on which it proceeded was vague, and therefore insufficient. So vague a charge would be held bad on a return to a mandamus: *King v. Shaw* ⁽⁵⁾; and a decision grounded on such a mode of proceeding would be liable to be quashed upon a certiorari. No specific charge was brought against Mr. Osgood; nothing which resembled an indictment was furnished to him. The report of the committee resembled, perhaps, a committal by a magistrate; but if so, then he would be entitled to a perusal of the indictment found on it. That

⁽¹⁾ 2 Ld. Raym., 1564.

⁽²⁾ 12 East, 479.

⁽³⁾ 4 Burr., 2244.

⁽⁴⁾ 12 Mod., 113; 1 Strange, 457.

⁽⁵⁾ 8 Mod., 148.

was not furnished to him, for no indictment could be said to exist. But if this resemblance existed, there arose another objection, namely, that there was no jurisdiction to commit; it was as if a committal had been made by a person not in the commission of the peace. Then, again, there had been a change in the committee, which was not composed of the same persons at the beginning and at the end of the inquiry; *nor did all those who signed the report attend all the [643 meetings of the committee; besides which the time of office of the committee men first named had actually expired before the period at which the report was made. All these things were matters which vitiated the proceedings. The only way to give an appearance of regularity to these proceedings, would have been to make a new reference, and appoint a new committee. Again, the mayor and common council ought themselves to have heard all the evidence. This they had not done. They were not entitled to take it on the report of the committee. They had so taken it. They had not even the rules for the conduct of the business of the office laid before them. [LORD CHELMSFORD :—A learned counsel was present to represent Mr. Osgood, and did not object to any want of evidence, but expressed himself ready to proceed.] That was done in the belief that all the evidence which had been before the committee was produced to the mayor and council. That mistake could not bind Mr. Osgood. If there had been a mandamus, and these facts had been returned upon it, the return would have been insufficient: *Rex v. Faversham* (*), where also the observations of Lord Kenyon show that if the court of the mayor and council did possess the power of removal, they had no right to delegate that power to a portion of their own body. And that objection is all the stronger, because, this being in substance a criminal case, the evidence ought to have been taken by the whole body which had to decide upon it, and not by any particular portion of that body.

Mr. *Archibald* and Mr. *Hugh Cowie*, on the other side, were not called on.

THE LORD CHANCELLOR (Lord *Hatherley*):

Before proceeding farther upon the main point in this case, and taking the opinion of the learned judges by whom we are assisted upon it, I think it right just to state my view, concurring I believe with that of your lordships who are present, with regard to one point upon which we almost stopped the learned counsel for the plaintiff in error, considering it too clear for argument. He contended that although by the Act of 15 Vict.

(*) 8 T. R., 352.

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644] c. lxxvii. (local) a power *of amotion from this particular office was granted to the mayor, aldermen, and commons in council assembled, yet by virtue of subsequent legislation this power of amotion had been transferred from that body to the lord chancellor. The argument was this: there are certain Acts of Parliament relating to county courts which took away from the judge of a county court the power which that judge had before exercised of removing the registrar of his court, and transferred that power of removal to the lord chancellor.

In a subsequent act, which dealt with county courts, and gave farther directions as to their powers and farther authorities to them, amongst other clauses there was one which enacted that this particular court—the Sheriff's Court of the City of London—should have all the powers, authorities, and jurisdiction of the county courts, and that the judge there should be in all respects visited with the whole authority of a judge of a county court; and then there was a clause by which certain Acts of Parliament, amongst others that act which I have mentioned as transferring the power of amotion of the registrar from the judge to the lord chancellor, were incorporated in a fashion which has become common in modern Acts of Parliament; they were directed to be read into the act I have last been speaking of, as if they had been there repeated. Upon that the suggestion is made that amongst other things there had been embodied in the act the clause whereby the power of amotion of the registrar had been transferred from the judge of the county court to the lord chancellor.

Now, really there would be a complete confusion of terms and of thought if one could allow any such suggestion to be for a moment entertained, because the simple fact is, that the last act shows that the legislature conceived it to be desirable that the Sheriff's Court should have all the powers and authorities of the county courts as they were then established, but it said not one word about the constitution of that court, nor one word about altering any of the powers or privileges possessed by the mayor and corporation of London with reference to dealing with the registrar or officers of that court. Upon that point I believe your lordships concur with me in thinking that we do not need any assistance.

With regard to the main question, before calling upon the 645] *learned counsel on the other side, unless the learned judges should themselves wish to hear farther argument upon it, it would be desirable that your lordships should put this one question to the judges: Whether the plaintiff was lawfully removed from the office of chief clerk or registrar of the Sheriffs' Court of the City of London?

The question was agreed to, and was put to the judges, who retired to consider their answer.

After an interval.

MR. BARON MARTIN, speaking in the name of the judges present, said :—

My lords, the judges do not require to hear counsel for the defendant in error, as they are unanimously of opinion that the plaintiff was lawfully removed from his office of chief clerk or registrar of the Sheriffs' Court of the city of London.

One objection taken by the learned counsel, with regard to the amotion of Mr. Osgood, has been already disposed of by your lordships. The next objection taken was, that that amotion did not take place as the law required, on the authority of the lord mayor, aldermen, and commons, but by delegation. In our opinion there was no delegation at all. What was done was, that a complaint having been made to the body which had control in the matter, viz., the mayor, aldermen, and commons of the city of London, as to the conduct of Mr. Osgood, it was referred by them to a committee, which seems to have been long used in the corporation of London, known as the "Officers and Clerks' Committee;" and what they were directed to do was to make inquiry with reference to the alleged complaint, to take evidence, and to ascertain the truth of it, not for the purpose of that committee coming to any judgment or decision themselves, but for the purpose of their report being submitted to the mayor, aldermen, and commons in order that they might come to a judgment upon it. The argument of the learned counsel is erroneous in point of fact. That has not taken place which they allege to have taken place, and therefore there was no delegation.

We come, therefore, to the main question, which seems to us to *depend entirely on the 15 Vict. c. lxxvii. s. 11: [His [646 Lordship read it.] It is, therefore, obvious that the mayor, aldermen, and commons are to inquire into the matter; that the cause of removal is to be one which appears reasonable to them; and that there is no Court of Appeal of any kind from their decision.

There can be no doubt, my lords, that the courts of law in this country would take care that any proceeding of this kind should be conducted in a proper manner; that the person it was proposed to remove should have every opportunity of cross-examining the witnesses brought forward against him, or of otherwise opposing the case set up against him: that he should have the power of calling witnesses to prove his own case; and that he should have every possible opportunity which a person can have, according to the law and constitution of this country, of

defending himself and of establishing that he is not liable to amotion. Your lordship would take care to see that every person had all those opportunities; and I have no doubt, if your lordships were satisfied that there was any real substantial miscarriage of justice with regard to Mr. Osgood, that he had been deprived of any opportunity that he ought to have had of defending himself, your lordships would not permit this amotion to remain, nor any consequence arising from it.

But we are of opinion, that in the proceedings before the committee in the first place, every possible opportunity that could be given to any man was given to Mr. Osgood in this matter. He was allowed to cross-examine witnesses, and he was permitted also to call as many witnesses as he pleased. He was repeatedly asked whether he had any farther evidence to produce, and he was permitted to address the court himself, and to state his view of the matter, and to comment on the evidence. These proceedings having occupied four days, it was on the 21st of March that the committee came to a decision upon the matter. Therefore, as it seems to us, so far as the proceedings before this committee are concerned, it is impossible that any one can have had a fuller and fairer opportunity than Mr. Osgood had of bringing forward his case, with any evidence he might have to support it.

It was on the 21st of March that the report of the committee was presented to the Court of Common Council. The committee **647**] mon *council permitted a period of more than six weeks to elapse before proceeding to discuss it. It was then discussed, and Mr. Sergeant Tindal Atkinson, who was counsel on the part of Mr. Osgood, then repeated what Mr. Osgood had before said, and stated that he did not require any farther particularity in the charge. He was content to take the case as it then stood. He was requested by the recorder to state whether or not he desired to offer any farther evidence than that which appeared on the shorthand writer's notes, and he stated that he did not, and then proceeded to address the court at considerable length in regard to this matter. Throughout the whole of the proceedings Mr. Osgood had the presence either of the recorder or of the common sergeant for the purpose of assisting the committee and the common council. Therefore, it does seem to us that it is impossible for any man to have had what I may call a fairer trial than Mr. Osgood had with reference to this matter.

We also think that it is possible, although there is no necessity for giving any judgment upon it, that if a man was removed from an office of this kind for any frivolous or futile cause, and that appeared before a court of law, or before your lord-

ships, you would in all probability be inclined to treat the removal as a nullity, and not permit the man to be removed from such an office for a mere caprice or for a futile cause. And though it is stated in the act that it may be done for a cause which may appear reasonable to the mayor, aldermen, and commons, your lordships would in all probability construe that as meaning a cause which was reasonable, and not merely a futile cause. Not that your lordships would sit as a Court of Appeal upon the decision of the mayor and council; but you would take care to see that the cause was a real and substantial cause. It appears to us to be impossible to read these proceedings without seeing that there was a real and substantial cause in this case if it was established.

As regards the cause alleged in the first place, it is said that Mr. Osgood was habitually absenting himself. I do not see how it can be stated otherwise than by stating habitual non-attendance. How could habitual non-attendance be proved, except by a man not performing his duty, and not going from day to day to the duties that were imposed upon him, and of course making excuses *for his absence? It seems to us, [648 that when non-attendance has taken place, it is for the mayor, aldermen, and commons to decide whether or not the excuse offered is sufficient. There were, again, other matters of the same kind stated with regard to the mode in which the business was conducted with regard to the summonses and other documents, which were allowed to remain unsigned for months, and then signed by a stamp by Mr. Osgood or by his deputy. I say nothing with regard to the signing by means of a stamp; it is used now in Judges' Chambers and in county courts with very great convenience and to a large extent, and that charge would probably be a matter which your lordships would consider to be of rather a frivolous character.

With regard to the rest of the case, it is impossible not to see that there was evidence of matters affecting Mr. Osgood which might reasonably enough be deemed by the mayor, aldermen and commons to be a just cause for his removal. The courts of law or your lordships would certainly protect an officer against being removed for any frivolous or futile cause. That seems to us to be the province of courts of law, though they cannot discuss this case in the manner in which it was put forward by the learned counsel for the appellant, as if your lordships were sitting here as a Court of Appeal from the judgment of the mayor, aldermen and commons.

For these reasons, my lords, the judges are of opinion, in answer to your lordship's question, that the plaintiff was law-

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fully removed from his office of chief clerk or registrar of the Sheriffs' Court of the city of London.

THE LORD CHANCELLOR (Lord *Hatherley*):

I have to express our thanks to the learned judges for the attention they have paid to this case, and the assistance they have given us in its determination. I confess that my own judgment, and I believe that I have the concurrence of your lordships in that view, entirely agrees with the answer which has been given by the learned judges to the question which we have propounded, and which is, indeed, the whole question in the case. It is necessary to add very little to what they have just said.

I feel, as all of us probably feel, a regret that so painful a **649]** *sult* *should have accrued to the plaintiff in this case from a dispute originally arising in a very small subject, and of very narrow dimensions. But the main point we have to consider is this: whether a full inquiry has been made by those who have the power of amotion for reasonable cause, whether reasonable cause has been assigned, and, in the judgment of those persons who have the power of removal for reasonable cause, has been established. The question we have to decide is whether it is competent for any court of law to interfere with a course of procedure which is in itself consistent with truth and justice, and to set aside a decision to remove for a cause which may seem to be reasonable, and which is not a mere result of caprice or violence. I apprehend, my lords, that, as has been stated by the learned baron who has delivered, in the name of the judges, their unanimous opinion, the Court of Queen's Bench has always considered that it has been open to that court, as in this case it appears to have considered, to correct any court, or tribunal, or body of men who may have a power of this description, a power of removing from office, if it should be found that such persons have disregarded any of the essentials of justice in the course of their inquiry, before making that removal, or if it should be found that in the place of reasonable cause those persons have acted obviously upon mere individual caprice. There is a power in the courts of law, as the lord chief justice said, to examine whether reasonable cause has been assigned; and, as one of the authorities which has been cited to us this morning has stated, that by "reasonable" must be meant "just cause," whether just cause has been assigned, and whether there has been any evidence given in support of that just cause, so as to show that the tribunal has not acted simply upon its own view of what is right and just, without any inquiry into the case; and then, farther, to see whether the accused has had

every opportunity of meeting the charge which has been made against him.

I apprehend that it is quite reasonable that the powers conferred by this act of parliament upon the mayor and common council of London should be controlled within these limits. But, beyond that, when they have pursued the inquiry before them into that which is alleged as a reasonable and just cause, according to the ordinary mode of administering justice—when they have given *the accused an opportunity of knowing [650 the charges (and I here take occasion to observe that his counsel did distinctly know the charges, for he did distinctly, as he expressed it, eliminate the charges which were made against his client, by which, I presume, he meant that he abstracted from the mass of evidence that had been given the several charges which had been made); and when the accused had an opportunity of hearing the evidence which had been given in support of those charges, and an opportunity of cross-examining the witnesses, and an opportunity of producing his own witnesses, and when he informed the committee that he had produced all the evidence he desired to produce, and when the cause was one which was just and reasonable in itself, if proved, the committee had no farther duty to discharge. It was left to those in whom the power of removal rested to act and decide upon the evidence so placed before them, and with their decision it is not competent for the court below, or for us sitting to review the decision of that court, to interfere.

I therefore concur with the view which the learned judges have taken in this case, and I apprehend that the course which your lordships will pursue, however painful it may be in regard to what has been brought forward in this inquiry, will be to come to the conclusion of affirming the decision of the court below, and dismissing this appeal with costs.

LORD CHELMSFORD :

My lords, I have very little to add to the observations which have been made by my noble and learned friend. The only question which your lordships have to determine is, whether there is evidence of breach or neglect of duty on the part of Mr. Osgood for which the Court of Common Council might properly be of opinion that reasonable cause existed for his removal from his office. It is not a question whether the judges in the court below, or this House, might have come to a different conclusion if the case had been originally before them; but whether the mayor and common council have proceeded to a motion without any proof at all of a reasonable cause for such a proceeding. There can be no doubt that if the courts below had been of

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651] opinion that *there was no evidence that Mr. Osgood had improperly discharged the duties of his office, judgment might have been given for him on the ground that he was unlawfully removed. But all the judges, without a single exception, have been of opinion that there was evidence which supplied a ground for the judgment pronounced. And this opinion is all the more entitled to attention from the fact that the judges confess they would willingly have come to a different conclusion if the evidence had not satisfied them that there was proof of Mr. Osgood not having properly discharged the duties of his office.

Now I should wish to say a very few words indeed with regard to the proof of neglect of duty brought before the Court of Common Council:—[His lordship went through several parts of the evidence, and expressed his opinion that the members of the Court of Common Council might reasonably have acted upon it.]

It might be that other persons might not be of opinion that there was a sufficient cause for his removal; but it is clear that there was a reasonable ground. There was not, perhaps, such a ground as others might have thought fit to act upon—but when you are called upon to say that there was no evidence whatever, which is the only ground whereon you could reverse the decision, and when you find instances of neglect proved, I think there is quite sufficient ground for your lordships to be of opinion that it is impossible to reverse the decision which has been pronounced by the Court of Common Council; and therefore I agree with my noble and learned friend that the judgment of the court below must be affirmed.

LORD COLONSAY:

My lords, I will say a few words indicating the grounds upon which I cannot concur with the contention of the appellant in this case. I quite agree that the office held by Mr. Osgood was what may be regarded as a judicial or official office. I think it is so in its nature, and I think that the tenure of it is secured to him by the terms of the 11th section of the statute, that is to say, that he cannot be removed except for cause. Then that same section of the statute prescribes the parties who are to be the judges of that cause. They are to be the judges 652] of the fact, and judges of its *sufficiency. That point being established, and such being their jurisdiction, I am also of opinion that if in the pretended exercise of that jurisdiction they act *malâ fide* (if that could be possible), or act upon frivolous grounds, they are not performing the duty which the statute gives them, or exercising the power which it confers upon them. If they were to remove him for some capricious

cause, such as the shape of his hat, or the cut of his beard, I hold that that would be clearly an improper proceeding, and that a supreme court of law could correct it. So, also, although less capricious than that, if it were clearly a futile cause, the court would interfere and protect the party against injustice done in a pretended or mistaken exercise of the jurisdiction which has been conferred upon the mayor, aldermen, and common council. But they being the judges of the fact and the judges of the law they were set upon an inquiry in this case.

Now, I think, there has been a misapprehension on the part of the appellant as to the nature of those proceedings. I do not regard it as a case to be assimilated to a criminal prosecution, it is an inquiry. And I do not regard Mr. Aikman as being in the position of a prosecutor in this matter, he disowns it; he assumes the position of an informer in regard to this matter. If the common council comes to the knowledge through one officer that a particular officer has been neglecting his duties habitually, I think it becomes the duty of that body, under such circumstances, to inquire into that matter, and to use such means as exist to ascertain the truth. Having been informed by Mr. Aikman, through his letter and through the subsequent statements that he made; that Mr. Osgood had been in the habit of neglecting his duty, and that certain other objections were made to the way in which he performed his duty, the mayor and council did institute an inquiry, and they called Mr. Aikman, who had made those statements, he being an officer of the court, before them, and required him to substantiate what he had said in order that they might see how the truth really stood. That inquiry went on. It may have happened in the course of that inquiry that matters were evolved prejudicial to Mr. Osgood which had not been contained in Mr. Aikman's statements. Still, if they came out in the course of the inquiry, though Mr. Osgood was to be allowed a fair opportunity of *meeting [653 them, they were not to be neglected or treated with indifference.

Then it is said that the charge against him was too general in its character, it being merely that he had not performed his duties satisfactorily. I quite agree that if that had been the original charge against Mr. Osgood, and if he was called before this tribunal upon an allegation that he had not properly discharged the duties of his office, he was entitled to ask, and to require, that he should be told in what respect it was supposed that he had not properly discharged the duties of his office. But the matters in which it was said that he had neglected his duties, or that he had improperly performed them, were stated, to a certain extent, at the outset, and the rest were evolved in the course of the inquiry, and Mr. Osgood was afforded an op-

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portunity of meeting them, and he did meet them. Whether he met them satisfactorily or not is a different question. The inquiry was a full one, both parties being present and having what assistance they required, and I do not see that the common council proceeded in any respect irregularly.

I quite agree with the observation made by the learned baron, that there was no violation of the rule against delegation in this case. The mode adopted was the mode in which such inquiries are ordinarily conducted, and necessarily conducted, by such a tribunal. What was the course which Mr. Anderson stated to have been requisite? It was that after this committee had made their report, if they did make such a report, there should have been an assembling of the common council, there should have been a prosecutor appointed, and there should have been a new trial, with all the formalities of a criminal trial, before they could have arrived at a conclusion. But the committee appointed to inquire into this matter having made the inquiry in the ordinary way, having collected the evidence in the ordinary way, and allowed the party, who had been present at the collecting of that evidence, to state his case by counsel, I cannot conceive a more fair mode of proceeding. The conclusion at which the committee arrived is a different matter; but that was the course of the proceeding. The resolution which 654] it came to was a general resolution, that Mr. Osgood *had neglected, or had not properly discharged, the duties of his office. Now, if there had never been any specific statement, either made by Mr. Aikman, or evolved in the course of the inquiry, I should have thought that that finding of the common council was very similar to what occurred in one of the cases which has been cited at the bar, and that it would have been too vague for such a case. But when we see that there had been charges made, and matters particularly evolved in the course of inquiry, I think the general finding must be referred to those matters, and taken as being a general conclusion derived from the inquiry into those matters.

These matters are collected by the lord chief justice in one portion of his speech. They had been classified by Mr. Osgood's counsel, but the lord chief justice classifies them into three heads, very distinctly. The undertaking of the learned counsel for the appellant at the bar, was to show that upon none of those heads was there any evidence whatever; but that, on the contrary, they were all totally displaced, and that there was no appearance of evidence to support any of them. If that had been the case, if there had been no appearance at all of evidence to support any of them, then there would either have been what we may call a miscarriage of justice, or an extraordi-

nary piece of misconduct on the part of the tribunal. But if there is evidence to support them—I do not mean to say conclusive evidence to your mind or to mine—but if there is that kind of evidence, which, as the lord chief justice describes it, might go to a jury upon the case, then the statute does make the tribunal the conclusive tribunal, without an appeal of any description from its decision. Now, I cannot say that the case is destitute of evidence. I do not say that I should have arrived at the same conclusion which the common council has arrived at, as to the balance of evidence in this case. But the members of that body were the jury as well as the judge, and they have found that there was evidence, and they have pronounced the sentence which they think ought to follow upon it. I cannot find anything to show that they have transgressed their powers, or that there is anything which we can call a miscarriage of justice in the case. I mean in the legal sense of that term. Whether Mr. *Osgood may have been harshly dealt with [655 is another matter. The lord chief justice says that if this had been the finding of a jury, where there is a power of correcting it by a new trial, he would have done what he could to upset such a verdict, and that might have been a very right thing to do; but we are not in that position. The matter is committed to this body, the mayor and common council, and if there is any evidence which might reasonably, to their minds, have led to such a conclusion as they have arrived at, a court of law is precluded, and we are precluded, from interfering with their conclusion.

Upon these grounds, my lords, I concur in the judgment proposed.

*Judgment of the Court of Exchequer Chamber
affirmed, and appeal dismissed with costs
Lords' Journal, 28th June, 1872.*

Attorneys for Plaintiff in Error: *Janson, Cobb, and Pearson.*
Attorney for Defendant in Error: *T. J. Nelson.*

If a member of a corporation or society be improperly removed or stricken therefrom, a court of law has power, by mandamus, to compel his restoration. *Waring v. Medical Society*, 8 Am. Law Reg. (N.S.), 538, 540; *People v. Mechanics Aid Society*, 22 Mich., 86.

And where one, has a right to membership, as of a medical society, may compel his admission. *People v. Medical*

Society, 24 Barb., 570; 25 How. Prac. 333, 32 N. Y., 187. But see *State v. Georgia Medical Society*, 8 Am. Law Reg. (N.S.), 533, and note, page 537.

A member may be expelled for breach of the by-laws of the association. *White v. Brownell*, 3 Abb., 318, 4 Abb., 162; *Dickenson v. Chamber of Commerce*, 29 Wisconsin, 45.

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[Law Reports, 5 House of Lords, 656.]

July 25, 27, 1871; July 8, 1872.

656] *BROWNLOW WILLIAM KNOX, Appellant; and FREDERICK GYE, Respondent.*Statute of Limitations—Partners—Fiduciary Relation—Trust—Costs—"Com-
prised."*

Where there is a remedy at law, and a correspondent remedy in equity, sup-
plementing that of the common law, and the legal remedy is subject by statute
to a limit in point of time, a court of equity in affording the correspondent re-
medy will act by analogy to the statute, and impose on the remedy it affords the
same limit as to time.

Where, therefore, in the matter of enforcement of a legal right, the court of
common law would, under the provisions of the statute of limitations, refuse the
enforcement after the lapse of six years from the accruing of the right of action, a
court of equity will, where its power to grant relief is asked for under similar
circumstances, adopt the principle of the statute, and decline to grant such relief.

Per LORD WESTBURY: There is no fiduciary relation between a surviving
partner and the representatives of his deceased partner; there are legal obliga-
tions between them equally binding on both.

Per THE LORD CHANCELLOR (Lord Hatherley): There is a fiduciary relation
between them. The surviving partner alone having the legal interest in the
partnership property, and being alone able to collect it, there arises a right in the
representatives of the deceased partner to insist on the surviving partner holding
the property, whenever received, subject to the rights of the deceased partner,
and he cannot make use of the partnership assets without being liable to an ac-
count for them. This rule applies where there have been accounts settled be-
tween the representatives of the deceased partner and the surviving partner, and
the latter afterwards receives a debt due to the partnership, recognized in the
settlement of the partnership accounts, but not at that time received from the
debtor.

K. advanced money to G. on the faith of a letter, which K. insisted constituted
a contract of partnership in the profits of the business of the Italian Opera at
Covent Garden. G. insisted that it amounted to nothing but an agreement to pay
the amount of the loan and the interest on it out of the profits (if any should
arise), but that the concern remained his alone. The letters which passed be-
tween the parties were held to bear this construction, and therefore an account,
as of the profits of a partnership, was refused.

The advance was made with reference to the business of the Italian Opera
at Covent Garden, the lease of which theatre was in the name of G. alone. That
theatre was burnt down in 1856, and G. hired another theatre (the Lyceum), and
carried on the business of the Italian Opera there, and in two years' time returned
657] to a new theatre at Covent Garden, which *had been built in the inter-
val, and of which the lease, as in the former case, had been granted in his name
alone:

Held, that the true construction of the letters between the parties showed that
the agreement between them was confined to the old Covent Garden Theatre
alone, and therefore an account of profits alleged to have arisen at the Lyceum
and at the new Covent Garden theatres was refused.

T. advanced £12,000 to G. on the terms of partnership. T. made a will, leaving
this money equally between K. and G. T. died in December, 1854, before old
Covent Garden Theatre was burned, which event took place in March, 1856.
There had been, before December, 1854, negotiations between G. and one H. to
allow G. the use of Her Majesty's Theatre; but though a sum of £5000 (part of
T.'s £12,000) had been paid to H. under these negotiations, he had never per-

formed his contract. G. finally brought an action against H., and recovered judgment for £5000; but ultimately (after the death of T., yet within six years of the date of a bill filed by K. for an account) consented to accept £2,500 as a compromise. K., in December, 1864, filed a bill against G. for an account of profits in the partnership with T., and of what was due to K. in respect thereof, under T.'s will:

Held, that the right of K. under T.'s will began in December, 1854, and was barred, in equity, by analogy to the statute of limitations, the bill not having been filed till 1864:

Held, also (disa. LORD HATHERLEY, L.C.): That the surviving partner not being a trustee for the executors of his deceased partner, the payment of the £2,500 from H. within six years from the filing of the bill did not take the case out of the statute of limitations.

Per LORD WESTBURY: The phrase "comprised in the same account" in the 19 & 20 Vict. c. 97, s. 9, means that "would have been comprehended in."

THE plaintiff Knox filed his bill against the defendant Gye on the 29th of April, 1861, in which he alleged that the defendant, in September, 1849, became lessee of the Theatre Royal, Covent Garden, and of the scenery, etc., there, for the term of seven years, and carried on the business by means of an arrangement between himself and the several artistes, which came to an end with the close of the season of 1850. The defendant was then desirous of taking the concern of the said Opera upon himself, and so expressed himself to the plaintiff and Sir W. De Bathe, who declared their willingness to assist him, and "he, having the said concern in his hands, offered to the person or persons who would find the capital a share in the profits, together with interest for their money during the time it might be employed," the defendant, in addition to his own share of the profits, to be entitled to the yearly salary of £1500 as manager. No formal *agreement in writing was drawn up, [658 but the plaintiff relied on a letter written by the defendant to plaintiff, on the 10th of February, 1851. The letter in question was as follows: "I fear you must have long thought me very negligent in not having before written to you some account of my movements and proceedings. For this I can excuse myself by telling you that I wished to delay writing till I could tell you that all the Royal Italian Opera affairs were satisfactorily settled; but I can make no excuse for not having, soon after leaving England, told you in writing how deeply I have all along felt your most kind and generous conduct towards me, with regard to the undertaking of the theatre. Such kindness has made the deeper impression on me for the reason I never before was in the situation to require such assistance, and to have then found it at a moment when I did require it, and offered with such total disinterestedness, causes me to feel ten-fold grateful. I must, however, repeat to you, that never have I for one moment thought of appropriating a farthing of the profit which ought to belong to any one advancing money, but

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have always intended to pay to you a proportion which I conceive you ought to have, as well as, of course, a proper interest for the money the time it may be employed. This I hope and trust you will consent to. Should you have found any difficulty in raising the money in the manner you spoke of, I have no doubt my bankers would advance it on your security, as we talked of." The rest of the letter contained details of Gye's interviews and arrangements with singers in different places on the continent.

The bill went on to allege that the defendant assented to the proposal contained in this letter, and entered into a joint bond with the defendant to Messrs. Coutts in order to obtain an advance of £10,000, which was to form the joint capital of the partnership. This sum was placed at Coutts' to an account called "The Account of the Royal Italian Opera." The checks drawn upon it were to be in the defendant's name alone, but were to be marked "R. I. O." The plaintiff had repaid £5000 of the bond debt. The defendant had admitted that the season of 1851 resulted in a clear profit of £4226 17s. The season of 1852 resulted in a loss. In the year 1853 farther capital was required, and one Arthur Henry Thistlethwayte agreed to become a partner in the adventure, and brought into the *concern [659] a sum of £12,000 as his share of the joint capital of the partnership.

The bill, in order to show that the defendant had always written and spoken as if the relation of partnership existed between himself and the plaintiff, set forth several letters from defendant to himself. In one dated Sept. 6, 1853, were the following words: "When you go to Coutts I would not speak about giving up the theatre, as if that got abroad it would surely prevent the possibility of carrying out such a thing. Mind, I have never told them that your position was otherwise than a security for me for the £10,000." The bill alleged that the plaintiff and his said partners had at that time an idea of getting rid of the said concern on account of the last two seasons being unprosperous. It set out another letter, dated on the same 6th of September, 1853, written by Gye to the plaintiff, in which it was said: "After all, we did not look at the books the other day. Don't you think we ought to spend a quiet day over them, or do you not think it would be most advisable for you to get some one well versed in such matters to go carefully through them, that is, if you know any one to be trusted with such secrets. Still, the accounts must be perfectly simple, and only require a little patience on our parts. I would not mention to Coutts our idea of giving up the theatre, nor throw cold water on it in any way, as that would

be the certain way to prevent our disposing of it; in fact, the only chance of selling it to the Ward party is in making them believe we are going on." In another letter, dated the 5th of December, 1853, the defendant wrote that he had been through the books with Robertson (the treasurer of the theatre), and after some other matters, the defendant said: "I am as anxious as you to have some plan decided on for the future, for the dreadful anxiety and heavy responsibility and uncertainty sometimes drive me almost out of my mind." In another letter, dated the 17th of December, 1853, the defendant said: "Sir William led me to think that you imagined I felt some reluctance to give you these accounts. Why should I? If you should have such an impression, dismiss it from your mind." On the 30th of December, 1853, the defendant (referring to a transaction which was going on with a person named Hughes) wrote to the plaintiff, saying: "I inclose you counsel's opinion on the case of Her Majesty's *Theatre, by which you will [660 see we cannot eat our cake and have it too, or get back the money and retain possession of the theatre." In a letter of the 4th of January, 1854 dated from the Italian Opera House, the defendant said: "Robertson promises to send me the balance sheet of 1853 by post on Monday morning, and, if convenient to you, I will come to you any time on that day you like. Probably you would prefer meeting here? in fact it would be more convenient here, as we could refer to the books if required." On the 3rd of March, 1854, the defendant wrote to the plaintiff, from Paris, a letter in which he described what he was doing in engaging singers for the Opera; and on the 9th of March another letter of the same kind from Dresden. On the 29th of March, 1854, the defendant wrote a letter in which, speaking of Mr. Thistlethwayte and his wish to "leave the concern," the defendant said: "You ask me to put in writing how the business is to be conducted for the future; how can I do this? You know how happy I should be to do whatever you like and whatever is fair and proper, but I do not understand on what basis you wish. Pray remember that I have never refused or hesitated to do anything you have wished or suggested, which the terms of your letter of yesterday would lead any indifferent person to suppose. If I knew what your wishes were, whether to remain in or leave the concern, I could then, at all events, suggest my own ideas, but I do not. When last we spoke on this subject here, you spoke of leaving the speculation altogether, and said it was best to know when to make the first loss. Whatever my opinion may be of the hopes of the future chances of prosperity of the Opera, you know I have abstained at all times from saying anything to persuade

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you to carry it on. Much as I should regret your leaving it, however, I candidly confess that what has occupied my mind more than anything else since yesterday, is the consequences as to your reason for your great change of feeling towards me, and my utter ignorance of having done or said anything to deserve so great a change. My feeling was, has been, and always will be, one of deep gratitude to you for the kind and unasked for act of assisting me on first taking the Opera on my own shoulders. This feeling has ripened into one of sincere affection for you, which has never for one moment altered, and therefore I never could, for one moment, either in thought 661] or deed, *have ever even contemplated doing anything contrary to your wishes."

In March, 1853, a sum of £5000 had been borrowed, on the promissory notes of Thistlethwayte, and given to the respondent in order that the same might be and they were accordingly paid by him to one W. S. P. Hughes, in respect of a year's rent in advance for Her Majesty's Theatre, which the respondent had at that time agreed to take of Hughes, who, as an elegant creditor, claimed to be in possession of that theatre, but who never gave possession of it to Gye. This sum, the bill alleged, was in fact part of the capital brought into the concern of the Royal Italian Opera, Covent Garden, by Thistlethwayte, all whose £12,000 remained in the concern.

In a letter of December, 1853, from Knox to Gye, it was said: "Thistlethwayte is much disgusted, and is very anxious that the £5000 paid to Hughes should be got back, and I promised that it shall be; so you must write at once to Hughes, as he has not given you any equivalent for the money paid."

An action was subsequently brought by Gye against Hughes, and a verdict recovered for £5000 and costs. This claim was, in 1862, compromised by Gye for £2500, which he received, as the bill alleged, without Knox's assent or knowledge.

The bill alleged that Thistlethwayte had in 1854 been ordered with his regiment to the Crimea; that a deed was proposed between him and "his partners," the plaintiff and defendant; this was not executed, but Mr. Thistlethwayte executed a will bequeathing the said sum of £12,000, his share of the capital in the said undertaking, to the plaintiff and the defendant for their equal benefit as tenants in common; that since then the plaintiff and defendant had continued to carry on the said adventure or undertaking in partnership. The bill alleged that the plaintiff did not at first know that a will had been executed, but had believed, from the expressions used by Mr. Thistlethwayte himself, that it was a deed.

The bill set out a letter of the defendant dated the 7th of

February, 1855, stating a profit of £2661 4s. 8d. for the season of 1854, "supposing all debts to be collected." The letter went on to say that the books were at the theatre, and should be sent to Wilton Crescent (the plaintiff's residence) whenever the plaintiff would like to look quietly over them.

*The bill stated that the season of 1855 had resulted in a [662 profit, but that no account had been rendered by the defendant; that on the 5th of March, 1856, "the theatre (which had been, against the wish of the plaintiff, let for a short time to a person of the name of Anderson, who gave a masked ball therein, contrary to his agreement) was burnt down." It then alleged that the Lyceum Theatre was rented for the years 1856-57 "in the name of the defendant, but for the purpose of the partnership;" that the plaintiff accompanied the defendant to Paris, and "upon the representations and assurances of the plaintiff that the concern would be carried on, the artistes consented to fulfill and did fulfill their engagements, and accepted reduced salaries for 1856 and 1857," which seasons resulted in an aggregate profit of £5000. The lease from the Duke of Bedford for the new theatre was to be in the defendant's name; the cost of the building was to be defrayed by contributions; "the repayment thereof was to be secured to the several contributors by a mortgage of the new lease and the new building." The bill set forth a letter of the defendant, in which he said he had given to Lucas the builder the name of the plaintiff "as one of the contributors," and a letter on this subject was to be sent by the Duke of Bedford's solicitor to the plaintiff and to "all other persons advancing the money." The letter spoke of £3000 as to be advanced by the plaintiff, and said: "Should the getting of this money be of any expense to you, I shall be most happy to pay it out of the theatre funds." The plaintiff declined to become one of the contributors. The new theatre was opened in May, 1858, and such stock and effects as had been saved, which the bill alleged to be "partnership stock and effects" saved from the fire, were, in that season and the seasons of 1859 and 1860, employed in the business, which for those seasons resulted in a considerable profit; but the defendant had never accounted to the plaintiff for any part of such profit.

Disputes about that time arose between the parties as to the nature of the relation existing between them; the plaintiff affirming and the defendant denying that there was a partnership. On the 30th of May, 1860, the plaintiff wrote a letter requiring the defendant "to settle in full all moneys I may have advanced with interest thereon, and also be prepared to settle with Messrs. *Coutts & Co, and also all other transac- [663

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tions connected with the Royal Italian Opera, in which I am liable."

There were other letters demanding a settlement in nearly the same terms.

The prayer of the bill was, that the partnership might be declared to be dissolved; that the debts of the partnership now remaining due might be paid and satisfied; that accounts might be taken of the partnership dealings and transactions, of what was due to the plaintiff in respect of his share of the capital of the partnership (including the plaintiff's share of the said sum of £12000) and interest thereof, and of the profits of the partnership; for a receiver; and for general relief.

The case came on for hearing before Vice-Chancellor Wood on the 4th of December, 1863, when his honor was of opinion that the transactions set forth in the bill did not establish a partnership between the parties, but did constitute an agreement between them for an advance of money by Knox upon the terms of the same being repaid on demand, out of the profits accruing to Gye from the adventure. The decree therefore declared that a contract of partnership did not at any time exist between Knox and Gye, but that they became jointly and severally bound to Messrs. Coutts; that the appellant had paid £5000 on that bond on an agreement to be repaid by Gye out of the profits from the adventure; that Knox was entitled to be so repaid, and to be repaid any farther sums he might have to pay on such bond. As to the claim of partnership between Knox and Gye, the bill was dismissed. An inquiry was directed as to profits from the 5th of March, 1852, up to the date of the decree, with liberty to apply; and it was ordered that Knox should be at liberty to amend his bill as to any alleged assignment of the share of Thistlethwayte, and to file a supplemental bill to raise such claim as he might be advised to make in respect of the bequest in Thistlethwayte's will; and if within three months from the date of the decree Knox should file such bill, the inquiry directed by the decree was not to be proceeded with until farther order.

On appeal to the lords justices they differed in opinion. Both their lordships thought that the case for a partnership had failed. But Lord Justice Knight Bruce thought that Knox [664] should be at liberty to file a new bill, on the footing of the agreement to pay the sum advanced out of profits while Lord Justice Turner thought that Knox was entitled to relief on the bill, as it stood, in respect of the agreement, and that the decree of the vice-chancellor was so far, approximately if not entirely correct, and that the cause ought to be allowed to stand over with leave to amend as regarded the claim made by Knox through

the interest bequeathed to him by Thistlethwayte. This opinion, however, was withdrawn in order to allow of an appeal, and the decree of the 6th of December, 1863, was ordered to be reversed and the bill to be dismissed, but without prejudice to farther proceedings.

In October, 1864, Knox, in pursuance of the leave reserved, filed a second bill, praying for accounts from the 14th of March, 1851, to the time of taking the accounts; that the partnership between Gye and Thistlethwayte might be directed to be wound up and the debts of the partnership paid; that an account might be taken of what was due to Knox in respect of his share of the sum of the £12,000 (including the whole of the judgment debt due from Hughes and interest) and also of the profits of the partnership between Gye and Thistlethwayte; that a receiver might be appointed; and for general relief.

The answer to this second bill set up, with respect to the claim for Thistlethwayte's share, the statute of limitations; that Knox was not entitled to any account of the profits of the new adventure at the Lyceum and the new Covent Garden Theatre; that as to the sum of £5000 advanced by Knox, it was advanced by him pursuant to previous agreement for the purposes of the then Covent Garden Opera, and was not to be repaid if, in that adventure, it was lost, and that after the advance it was lost by the destruction of the Opera House; that Knox's right to repayment could only be tried at law and not in equity; that as to the share of Thistlethwayte the partnership with him was confined to the business of the old theatre; that the whole of the capital of that concern was lost by the fire; and that Knox was not entitled to any account of profits made since then.

This second cause came on before Vice-Chancellor Wood on motion for a decree, when his honor, on the 30th of January, 1866, expressed an opinion that the statute of limitation did not apply either as regarded the sum of £5000, which, if [665 a debt, was not a debt payable on demand, but was not a debt at all, but was an equitable claim enforceable in equity alone; or as regarded the share of Thistlethwayte, the application of the statute to that part of the claim was excluded by the fiduciary relation existing between Thistlethwayte and Gye, and by the fact that the money recovered from Hughes was received within six years before the institution of the suit; and an account was ordered of profits from the date of the bond given to Coutts to the close of the season of 1857; (at the Lyceum, the concern there being treated as a mere continuation of the original concern at old Covent Garden). And it was declared that Knox, as executor of Thistlethwayte, was entitled to the

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capital remaining due to Thistlethwayte in respect of his share in the capital and effects of the original undertaking to the time when Gye entered on his new undertaking, and also to the profits on such capital during such period and no longer. And that Knox and Gye were interested by the will in equal moieties in this share of the capital, and that Thistlethwayte's share amounted to one-third of the profits of the concern.

Gye took this decree by appeal to the lord chancellor (Lord Chelmsford), who, by an order dated the 20th of February, 1867, directed that the said decree should be discharged and varied, and in lieu thereof declared that the £5000 advanced by Knox in October, 1853, on the bond to Coutts was advanced to be employed in carrying on the undertaking of the Royal Italian Opera at Covent Garden, upon an agreement that it should be repaid out of the profits thereof, and continued invested therein on such agreement until the said undertaking was determined by destruction by fire of the Opera House on the 5th of March, 1856. The order, therefore, directed an account of profits from March, 1852, to March, 1856. And the bill was dismissed so far as it related to the claims of Knox as executor of Thistlethwayte, on the ground and it was barred by statute of limitations.

This order was now brought up by appeal to this House.

Sir *R. Palmer*, Q.C., and Mr. *Townsend* (Mr. *J. J. Wood*, was with them), for the Appellant:

The order of the court below was wrong in limiting the 666] account *to the period when old Covent Garden was destroyed by fire. The appellant was a partner with the respondent, and the partnership was not affected by the destruction of the theatre and the removal of the business of the partnership from one house to another.

Then, if they were partners, the liability of the respondent (who managed their common business) to render an account to his copartner cannot be disputed: *Miller v. Miller* ⁽¹⁾; which was recognized and acted on in *Millington v. Holland* ⁽²⁾. In the former of these cases an account was ordered, though more than six years had elapsed since the partnership was discontinued, and in the latter the representatives of a former partner sustained a bill for an account against the surviving partner, the vice-chancellor holding that the surviving partner was bound to get in the assets, for that a statement made in 1863, shows that there were some, and that that being so they must be discharged. These cases were in accordance with *Robinson v. Alexander* ⁽³⁾, where the last item in the transactions between

(1) Law Rep., 8 Eq., 499. (2) Weekly Notes, 22 Nov., 1869. (3) 2 Cl. & F., 717.

two persons who were partners in a ship and its earnings arose in 1806, and the bill was not filed for above twenty years afterwards, but it was held sustainable, and an account was directed. *Barber v. Barber* ⁽¹⁾ appeared to be the other way; but it was doubtful there whether the accounts were not merchants' accounts which were expressly excepted from the statute 21 Jac. 1, c. 16, and that circumstance probably occasioned the decision. There were other reasons for doubting the authority of that case, which had been observed upon in *Robinson v. Alexander*; and it was curious that though it occurred about a year before *Foster v. Hodgson* ⁽²⁾ it was not there even referred to: and in this later case Lord Eldon adopted an entirely different course. In *Lindley on Partnership* ⁽³⁾ the learned author says that "so long as a partnership is in existence and each partner is in the exercise of his right and the enjoyment of his property the statute has no application at all," but he seems to put a limit to this statement by saying that the statute has been held to apply after the partnership has been destroyed, his reference for that matter being, however, made to this very case itself. It is submitted that in this case the partnership was not destroyed, [667 and that the supposed limitation on the rule does not, therefore, apply. In *Stocken v. Dawson* ⁽⁴⁾, A. by will authorized the sale of his share of a business to B., his surviving partner, whom he also appointed his executor. No sale really took place, but B. carried on the business. B. died, and it was continued by C., his executor. The supposed sale was afterwards set aside, and the creditors of C. were held by Lord Langdale not entitled to any claim against the partnership property, so far as the rights of A's representatives, the representatives of the deceased partner, were concerned. *Burdick v. Garrick* ⁽⁵⁾ decided that an agent who stands in a fiduciary situation towards his principal, and this is especially the case with a partner, cannot set up the statute of limitations in bar of a suit for an account by his principal, money held by the agent being treated as held in trust for the principal. It is held in trust by one partner for another. The lord chancellor (Lord Hatherly) in his judgment there ⁽⁶⁾ founding himself on *Foley v. Hill* ⁽⁷⁾, took the distinction between money entrusted to a banker and money entrusted to a factor or agent, saying that in the latter case it is entrusted for the purpose of being "employed in a particular manner," and that the agent therefore must be treated as a person in a fiduciary position. Here Gye was the acting managing partner of the concern.

⁽¹⁾ 18 Ves., 286.⁽⁴⁾ 9 Beav., 239.⁽²⁾ 19 Ves., 180.⁽⁵⁾ Law Rep. 5 Ch. Ap., 233.⁽³⁾ Last Ed., vol. ii. p. 980.⁽⁶⁾ Law Rep. 5 Ch. Ap., 240.⁽⁷⁾ 2 H. L. Cas., 28.

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He was entirely in a fiduciary position towards his partner, who advanced money to be employed in a particular manner, namely, in this particular concern, but who did not actively interfere in the management. So long as the undertaking, which was that of presenting to the public performances of Italian operas, lasted, so long the partnership continued, and it did not matter where the business of the undertaking was carried on.

The arrangement which existed between these parties was not affected by the destruction of the theatre. They were engaged in one common adventure or undertaking—it began at old Covent Garden, it continued at the Lyceum, and afterwards at the new Covent Garden Theatre, the lease of which house, though taken (as that of the old house had been) in the name 668] of Gye alone, was *held by him in trust for his partners. The possession of the old lease enabled him to get the new one, and part of the property of the old theatre, all in fact that could be saved from the fire, was used in the other two houses, where, after the fire, Gye carried on the joint business of himself and partners.

[THEIR LORDSHIPS intimated that if an account could at all be directed, that part of the business which related to the Lyceum must be altogether excluded from it, as they were of opinion that the partnership with the appellant, supposing the undertaking to have that character, extended only to the old Covent Garden Theatre. They therefore directed counsel to confine themselves to the argument as to the statute of limitations.]

Mr. *Jessel*, Q.C., and Mr. *Lindley* (Mr. *Gye* was with them), for the Respondent:

The facts here do not establish that there was at any time a partnership between the appellant and the respondent, but assuming that at one time there was one, it ceased by the destruction of the theatre, for it was only formed for that particular undertaking, and was brought to an end when the theatre was burnt. The account demanded is, therefore, asked for long after the period of limitation has elapsed.

The statute of limitations is a bar to this claim, made in the form of a bill in equity for an account, in the same way as it would have been a bar to any proceeding at law. The same principles govern the courts of law and equity with regard to the application of the provisions of the statute. At first the proceedings in account were always taken in courts of law, but the machinery of those courts was, for such a purpose, cumbrous and ineffectual. So recourse was had to the courts of equity, where the machinery for taking an account was far more easy.

But the rules of law applicable to taking it were and must be the same in both courts.

What are the authorities? *Bridges v. Mitchell* ⁽¹⁾ shows that though open or current accounts between merchants are not barred, yet they become so when once they have been adjusted between the parties. And founded upon that case came the decision in * *Barber v. Barber* ⁽²⁾. That case is not sub- [669] ject to the criticisms which have been made upon it. All the accounts there are distinctly said to have ceased for six years, and that was the ground of the decision. *Foster v. Hodgson* ⁽³⁾ was no contradiction to *Barber v. Barber*, and in that very case Lord Eldon, referring to the differences of opinion as to open merchants' accounts, mentioned *Welford v. Liddell* ⁽⁴⁾, and said ⁽⁵⁾ that "a merchant's accounts will be barred if there is no item within six years," and that there could be no relief upon that bill, for "whether they are to be taken as an open merchant's account" or not, the statement in the bill that no demand had been made for twelve years was a sufficient answer. In *Ault v. Goodrich* ⁽⁶⁾ an account was ordered because it was clear that the dealing by the younger Wilcox, sought to be made the subject of account, had taken place within six years of filing the bill, and it is said there with relation to the elder Wilcox's estate, that he, having devised his estate upon trust for the payment of his debts, the statute of limitations could not be pleaded in bar of demands which had a legal existence at the time of his death. It is clear, therefore, that the lapse of time here is a sufficient answer to this claim. In *Hill v. Walker* ⁽⁷⁾ the statute was distinctly admitted to constitute a bar to a claim against which time had run. *Millington v. Holland* ⁽⁸⁾ is not an authority on the other side, for there a statement of the accounts, with the balance due, was prepared by the solicitor to the representatives of the deceased partner, and being so prepared was presented to the surviving partner, and by him acknowledged and signed, and the bill was brought within six years after its signature, and consequently the statute could not be set up against it. But where the facts allowed it to be set up, as in *Adams v. Barry* ⁽⁹⁾, it was held a complete answer to the suit.

There was no express trust created here, and the law will not imply one. The parties stood upon legal rights alone. In the case of an infant, which much more nearly resembles a trust,

⁽¹⁾ 1 Gilb. Eq. Rep., 224; Dunb., 217.

⁽²⁾ 18 Ves., 286.

⁽³⁾ 19 Ves., 180.

⁽⁴⁾ 2 Ves., 400.

⁽⁵⁾ 19 Ves., 186.

⁽⁶⁾ 4 Russ., 430.

⁽⁷⁾ 4 K. & J., 166.

⁽⁸⁾ Weekly Notes, 1860, p. 238.

⁽⁹⁾ 2 Col. C. C., 290.

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670] the *statute would be a bar. In *Lockey v. Lockey* ⁽¹⁾, Lord Macclesfield said that "the receipt of the profits of an infant's estate is not such a trust as being the creature of a court of equity the statute shall be no bar to. If the infant lies by for six years he is barred of his action of account at law, so he shall be of his remedy in this court, and there is no sort of difference in reason between the two cases." This opinion was referred to and adopted by Lord Redesdale in *Hovenden v. Annesley* ⁽²⁾.

There is no fiduciary obligation imposed on a surviving partner after the dissolution of the partnership; he is liable to make good his legal obligations, but no more; there is nothing which affects him in the character of an equitable trust. In that respect, therefore, no exception is established to prevent the operation, in his favor, of the statute of limitations.

It is a principle of law that the chattels of a trading partnership do not pass to the surviving partner, but continue applicable to the purposes of the trade: *Buckley v. Barber* ⁽³⁾, where the whole law of partnership is, as to this point, fully considered in the judgment of Mr. Baron Parke.

Sir R. Palmer replied.

Adjourned.

LORD WESTBURY:

My Lords, this is an appeal from a decision of my noble and learned friend on the woolsack, when vice-chancellor, afterwards reversed by my noble and learned friend (Lord Chelmsford) as lord chancellor. It has been requested by those two noble lords that I and my noble and learned friend Lord Colonsay should commence by stating our opinions to the house upon the only point which is now left to be decided between the parties. That point may perhaps not be of much importance in a pecuniary point of view to those parties; but it is a very material question of law, and it is rendered more material by the difference of opinion. I shall endeavor, therefore, to state my view of the matter at some length (although I hope not inconveniently so), for the consideration of your lordships.

671] *This is a bill filed by the appellant as the executor and sole representative of a deceased partner, Mr. Thistlethwayte, against the surviving partner, Mr. Gye, for an account of the partnership estate, and of the share of the deceased partner therein as it stood at the dissolution of the partnership by his death in December, 1854, and of the assets and profits subsequently received by the surviving partner. Mr. Thistlethwayte died in December, 1854. His will was proved by the executor (the appellant) on the 6th of November, 1863. It

(1) *Proc.* in Ch., 518.

(2) 2 Sch. & Lef., 633.

(3) 6 Ex., 164.

appears that very shortly after the death of Mr. Thistlethwayte, letters of administration to his estate were granted to a creditor on the supposition that he had died intestate; and this administration continued in force until revoked by the probate granted to the appellant. There is no statement in the bill to account for the interval of time between the death of Mr. Thistlethwayte and the proof of the will by the appellant. Nothing appears to have been done by the administrator. The bill was filed by the appellant on the 4th of October, 1864. I omit all reference to those portions of the bill which contain statements and raise questions wholly unconnected with the subject of the present appeal. There is no special statement in the bill on the subject of the share of Mr. Thistlethwayte in the estate of the partnership, or of the respondent's dealings with the effects or assets, except that it is alleged that within six years before the filing of the bill the respondent, Mr. Gye, received a large sum of money from a Mr. Hughes, in respect of a debt or liability due to the partnership, and which sum was therefore part of the assets of that partnership; and it is on the fact of the receipt of this sum within six years before the institution of the suit, that the appellant chiefly relies. There is no allegation that any account was ever opened or kept by the respondent Gye, as between himself and the late partnership, or in which there were entries of his receipts or payments as surviving partner.

Upon this bill the plaintiff prays, with reference to this particular point, "That an account may be taken by and under the decree and direction" of the court, "of what is due and owing to the plaintiff from the defendant in respect of the plaintiff's share of the sum of £12,000 brought into and left in the concern by Mr. Thistlethwayte, as hereinbefore mentioned (including the whole of *the judgment debt recovered, or [672 which might, but for the wilful default of the defendant, have been recovered from Hughes), and the interest thereof and the profits of the partnership; and that what shall appear on taking the same account to be due from the defendant may be decreed to be paid by him to the plaintiff." From this and from other portions of the bill it is clear that the account sought is an account of the estate of the partnership as it existed at the time of the dissolution, and of the property and receipts by Mr. Gye subsequent to the dissolution of the partnership. The bill is, therefore, in effect, an action by the appellant, as executor of the deceased partner, against the surviving partner for an account of the share of the deceased partner in the partnership between him and the respondent, which terminated by the death of Mr. Thistlethwayte, in December, 1854. An action might have been brought for this account by the appellant against

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the respondent at common law, but in a case like the present a court of equity assumes and exercises concurrent jurisdiction with the courts of law, and this bill is brought by virtue of such concurrent jurisdiction.

By the statute of limitations (21 Jac. 1, c. 16), it is enacted that all actions of account and upon the case (with an exception which has been since repealed) shall be commenced and sued within six years next after the cause of such action or suit, and not after. This enactment is, in effect, repeated in the 9th section of the 19 & 20 Vict. c. 97 (passed in 1856), with this additional provision, namely, that "no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." I deem this provision most material, and therefore I will call your lordship's particular attention to it. It forbids any claim in respect of a matter which arose more than six years before the action.

In the case that we are considering, the matter, namely, the dissolution of the partnership, and, consequently, the possession of the partnership property by the surviving partner, did arise more than six years before the commencement of this suit. 673] The provision *forbids that any action of account the cause of which arose more than six years before suit shall be considered as liable to be sued upon after such six years "by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." The appellant here relies upon the claim against Hughes having been received and realized within six years before the commencement of the suit. The question is, was that claim against Hughes, that debt due to the partnership, a thing comprised in the same account? An account of the partnership estate would unquestionably comprise that claim, and the statute was directed, as we all know, against the erroneous notion that an account which had been barred by the lapse of six years after the last entry in the account might be considered as opened and revived by the receipt of a subsequent sum of money more than six years after the date of the last entry. It removes that notion, provided the receipt after the six years is the receipt of an item comprised in the original account. The word "comprised" I construe as equivalent to "that would have been comprehended" in; that is, that would have been an item in the account demanded.

Here the right of action arose upon the death of Mr. Thistlethwayte in December, 1854, and the cause of such action was the

possession of the partnership estate by the surviving partner. The right to an account was, therefore, barred by the statute in the month of December, 1860. If as an answer to the statute the appellant intended to rely upon the receipt by Mr. Gye of the debt due to the partnership from Mr. Hughes, he should have alleged and proved that this sum was received within six years from the death of Mr. Thistlethwayte; but this he has not done, and it is to be inferred from a paragraph in the bill (as is, in fact, stated by the answer) that the money was not received from Hughes until the month of June in the year 1861. This sum was a matter that was comprised in the account demanded by the bill, that is to say, which would have been an item in that account if taken; and, therefore, if the right to the account was taken away by the statute previously to the receipt of such item, the subsequent receipt cannot remove the bar and restore the title to the account.

That a court of equity will not, after the lapse of six years *without acknowledgment, decree an account between a [674 surviving partner and the estate of a deceased partner has been long settled by various decisions. The rule, of course, must be the same where the parties are reversed, and the representative of the deceased partner is the plaintiff. The general principle was laid down as early as the case of *Lockey v. Lockey* ⁽¹⁾, where it was held that where a court of equity assumes a concurrent jurisdiction with courts of law no account will be given after the legal limit of six years, if the statute be pleaded. If it could be doubted whether the executor of a deceased partner can, at common law, have an action of account against the surviving partner, the result will still be the same, because a court of equity, in affording such a remedy and giving such an account, would act by analogy to the statute of limitations. For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the statute of limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a court of equity acts by analogy to the statute of limitations, the meaning being, that where the suit in equity corresponds with an action at law which is included in the words of the statute, a court of equity adopts the enactment of the statute as its own rule of procedure. But if any proceeding in equity be included within the words of the statute, there a court of equity, like a court of law, acts in obedience to the statute. I have no doubt, therefore, of the statute of limitations being a bar to the whole of the relief sought by the appellant as executor of Thistlethwayte.

(1) Prec. in Ch., 518.

Your lordships will no doubt recollect that in the observations I have made with regard to the adoption of the statute by a court of equity, I refer to those well-known expressions of Lord Redesdale⁽¹⁾, in which he distinguishes between the cases where a court of equity acts in analogy to the statute, and where it acts in obedience to the statute. Where a court of equity frames its remedy upon the basis of the common law, and supplements the common law by extending the remedy to [675] parties who cannot have *an action at common law, there the court of equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords.

In deciding this case, it must be recollected that the representative of a deceased partner has no specific interest in, or claim upon, any particular part of the partnership estate. The whole property therein accrues to the surviving partner, and he is the owner thereof both at law and in equity. The right of the deceased partner's representative consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership.

Another source of error in this matter is the looseness with which the word "trustee" is frequently used. The surviving partner is often called a "trustee," but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner the law confers on his representatives certain rights as against the surviving partner, and imposes upon the latter correspondent obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner; but when these obligations have been fulfilled, or are discharged, or terminate by law, the supposed trust is at an end.

The advantage of correcting by familiar practice an inaccurate use of a word, although that use may be found in treatises of reputation, I remember to have seen singularly illustrated in a case that occurred some years ago in a court of law, where the court of law was told that in an agreement for the sale of a house the vendor was trustee for the purchaser, and the judges were called upon to apply a rule which is quite right as between a complete trustee by declaration and the *cestui que trust*, but quite wrong where the vendor is called a trustee only by a metaphor, and by an improper use of the term; and it required some trouble to convince them that though the vendor might be called a trustee he was a trustee only to the extent of his obligation to perform the agreement between himself and the

(1) *Horden v. Annesley*, 2 Sch. & Lef., 630, *et seq.*

purchaser. In like manner here, the surviving partner may be called a trustee for the dead man, but the trust is limited to the discharge of the obligation, which is liable to be barred by lapse of time; as between the *express trustee and the *cestui* [676 *que trust* time will not run; but the surviving partner is not a trustee in that full and proper sense of the word. It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor. This is one of the sources of error in this case. The mistaken phrase that a surviving partner is a trustee, and that therefore no time can run as between him and the representative of the deceased partner, has led to what I humbly conceive to be the error in the judgment originally given.

There is nothing fiduciary between the surviving partner and the dead partner's representative, except that they may respectively sue each other in equity. There are certain legal rights and duties which attach to them; but it is a mistake to apply the word "trust" to the legal relation which is thereby created. It will be asked whether the bar by the statute can be greater than a release between the parties? In the answer to that question the nature of the release must be required to be stated. If on an account stated a release is given, the release will be limited to that account, and will not bar the right of the executor to have an account of subsequent receipts. But if the release be of the right to an account altogether, then the release will be exactly equivalent to the bar here created by the statute, and will bar all rights whatever to claim the benefit of any subsequent receipt by the accounting party.

My lords, upon these grounds I am humbly of opinion that my noble and learned friend on my right (Lord Chelmsford), who was then lord chancellor, was correct in his view of the case, and that this part of the appellant's case wholly fails and must be dealt with accordingly. I regret to say that the printed cases, which are of considerable length, have been made to extend to all the other portions of the case which have been abandoned at the bar.

*LORD CHELMSFORD: They were not abandoned. We [677 stopped the counsel upon them.

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LORD WESTBURY: We stopped some, but I thought others were abandoned. I dare say my noble and learned friend is more accurate in his recollection than I am. However, they have all been printed in the case. I regret therefore to say that I see no possibility of escaping from the obligation of dismissing this appeal entirely, and dismissing it with costs.

LORD COLONSAY:

I concur in the result arrived at by my noble and learned friend. I shall not go over the details of the case. They have been fully stated by him. But I desire to express in a few sentences the grounds of my judgment.

I hold that the statute of limitations does apply to a suit brought by the executor of a deceased partner against the surviving partner demanding an account of the partnership concerns; and I hold, that such is the relative position of the parties, and that such is the demand made in this suit. I farther hold that, in the general case, the *punctum temporis* from which the statutory period of six years begins to run, is the date at which the partnership estate came to be vested in the surviving partner. At any time during the currency of that period the executor of the deceased partner may bring a suit demanding from the surviving partner an account of the partnership concerns, but after the statutory period has elapsed no such suit can be maintained. The present suit was not brought till after the lapse of the statutory period, if the period is to be counted as running from the date I have indicated. The deceased partner, Mr. Thistlethwayte, died in November, 1854, and the bill was filed in October, 1864. But it is said that in the interval, viz. in January, 1859, a considerable sum was received by the surviving partner as a compromise of a debt of larger amount due by one Hughes to the partnership estate; and it is contended that, as a period of six years had not run from the date of that recovery, until the filing of the bill, the statute does not apply. I cannot adopt that view. If adopted, the result would be that a new period of six years would run [678] from the date of every recovery *of partnership debts, and that would, in effect, make the statute valueless in regard to partnership accounts. And I see no reason for it, because the account if sued for within the statutory period must have comprehended all debts and claims, whether recovered or unrecovered, and whether good, bad, or doubtful. The kind of suit we are now dealing with is a suit for an account of the whole partnership concerns. I do not say that if a sum is unexpectedly recovered after the lapse of six years the executor of the deceased partner, though he has lost the right to sue for an account of the partnership concerns, may not in another kind

of suit demand a share of the particular sum so recovered. But I do not think that a suit such as the present suit, demanding an account of the whole partnership concerns, can be brought against the surviving partner after the lapse of more than six years from the period at which he first became liable to be convened in such a suit.

THE LORD CHANCELLOR (Lord *Hatherley*):

My lords, I regret that I have been unable to bring myself to concur in the views which have been expressed by the two noble and learned lords who have addressed your lordships on this case, I did say that I should, on every account, regret the continuance of the litigation between the parties in the present suit, which cannot be productive of any benefit either to the one or to the other, under any circumstances; but I have the less reason to regret it now, inasmuch as the noble and learned lords have taken the views which they have done of my noble and learned friend's judgment, the consequence, of course, is, that that judgment will be affirmed, and that the litigation will be terminated.

But in expressing my dissent from that judgment I have to express it very strongly with reference to one particular part of the address of my noble and learned friend who first moved the judgment of the House, namely, that part in which he said, very much to my surprise, that there is nothing fiduciary between a surviving partner and the executors of his deceased partner. I confess, my lords, that I thought it was an elementary principle of law that the partnership which at law survives to the surviving partner, which carries to him at law the whole interest in the partnership assets, which, treating him as a joint [679] tenant, vests the whole of the partnership estates in him, was always subject to the doctrine of a court of equity, that in equity the interest of a partner in the partnership is that of tenancy in common as between the two partners: so that the executors of a deceased partner have an interest in those assets which the surviving partner alone can get at, and that the surviving partner alone having a legal interest in the property, there arises, necessarily, a right, as between the executors of the deceased partner and him, to insist upon his holding those assets, which he so collects, according to the partnership interest, or subject to the share which the executors of the deceased partner, in right of their testator, are entitled to claim. So much so, that it is trite law that a surviving partner cannot make use of the assets of a deceased partner (apart at present from the statute of limitations, which I will consider presently), without being accountable for the use he has made of them. The executors of the deceased partner have

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a right to a sale of every portion of the partnership property, so completely are they held to be in a fiduciary position, so completely are the assets, including the plant or houses, the machinery or stock in trade, or whatever the description of property may be that comes into the hands of the surviving partner by right of his survivorship at law, and which are all vested in that surviving partner by right of his survivorship at law, held to be property in all of which, whether they are chattels of the partnership, or estates of the partnership, the executors of a deceased partner have an interest commensurate with the extent of the share of their testator. They have a right, therefore, to have that property so disposed of that it may be applied under the direction of a court of equity, according to the equitable rights between the partners. I quite agree that as regards the statute of limitations the point rests in a somewhat different position; but I thought it necessary in the first place to enter my protest against the language, which was to me entirely novel, that there was no fiduciary relation between the survivor of two partners and the executors of the deceased partner.

Now, as regards the right to an account, I cannot quite conceive that the right of the executors of a deceased partner [680] *will be barred by the statute of limitations if they do not assert their right to the account within the statutory period, and that equity will follow the law in that respect, and that it will adopt, as to a suit, the limit which the law has assigned with reference to the commencement of an action. It appears to me that the case we have had to consider here is this: I will assume that an account had been taken upon the death of the deceased partner, or immediately after the death of the deceased partner, that everything which could be ascertained had been then ascertained and adjusted, that the account was complete, and that releases were given. Those releases of course could only go to the extent of the claim that then existed as against the surviving partner. The surviving partner could not in such an account be made answerable for anything that he had not at that time received. There could be no proceedings taken against him in respect of moneys which he had not received. In taking the whole account, the account would be taken of all that had then come to him, and if the partnership property was not to be sold as a going concern (occasionally the courts of equity do realize partnership assets), and if therefore the debts were not to be taken at a valuation and made over to some person who had the management of the sale, the consequence would be that the debts outstanding must remain outstanding until they were collected, and no right of action would exist in

the executors of the deceased partner in respect of those assets until they had been collected.

Thereupon, if the accounts had all been settled and nicely adjusted and balanced, and if no debt was due from one partner to the other up to that period, assuming that the partners were partners in moieties, as soon as an asset, say of the amount of £20,000, had been received by the surviving partner by right of his survivorship as partner, then, and then only, would the executors of the deceased partner have a right to a moiety of that money, namely, £10,000. I apprehend it would be an extraordinary answer for that partner to make to any such a claim: True it is, you were entitled to this once, but you have settled all accounts more than six years ago, the parties who were indebted to the firm were not at that time able to pay their debts, they have paid them since, the money has been collected by me, the *surviving partner, who alone could collect [681 it; but having collected it I say that I hold no fiduciary position towards you; I will keep the whole of the money, and though I do not dispute that you represent a person who was once my partner to the extent of a moiety, and although I do not dispute that you could have had no right against me in respect of this sum, because the money could not be collected at the time when the account was taken, yet I can now answer thus: You should have filed your bill for an account at an earlier period. Perhaps he would say you should have kept on filing a bill every six years in order to have some sort of a hold upon me the surviving partner in respect of those assets.

The case I have put is not imaginary — it is not imaginary that a large sum of money may be received long after the ordinary accounts of the partnership have been closed. I well recollect a celebrated case, which is to be found reported in many of the books of the Court of Chancery, under the name of *Boyd v. Barfield*. Persons constituting a firm were ruined by the French revolution, they afterwards recovered large sums of money in respect of claims they had anterior to the revolution, and at an interval of more than twenty years they paid more than £100,000 in discharge of debts due by them to their various creditors. I will put the case of a large firm of partners of whom all but one had died. Several years afterwards a creditor pays a debt, say of £20,000, the surviving partner, takes the £20,000 and puts it all into his own pocket, and says: I am in no fiduciary position to the executor of the deceased; the whole of this money is mine, and I will enter into no account. Can he do this, and is there no remedy against him?

I am anxious, at all events, to put on record, my protest against the view which has been taken by my noble and

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learned friend in this matter. I apprehend that the right view to take of the matter would be this; if the partner who has insisted, and who has a right to insist, upon the benefit of the statute of limitations, says to the executor of the deceased partner, I am ready to pay you your moiety (that is, if the share should be a moiety) of those assets which I have received, but I decline to enter into any account that is barred — I concede (as is here done by Mr Gye) that your testator was once a partner [682] with me — I concede that he was, *as my partner, entitled to a share — I concede that I have only received this money by right of the partnership, and that, except for the partnership, I could not have received it; conceding that, I am willing to pay you that which is your own, but farther than that I will not go; and although I have received this sum, and am ready to hand it over to you, holding, as I must, as trustee for you in respect of your interest in the partnership, I will not go back to the partnership accounts, which I say are all settled, and as to which there are no accounts between us. I think Mr. Gye would have had a right to say so, but he does not. He says on the contrary, you are a debtor to me. I believe he says that, and he has a right to say so. I apprehend that it is he who requires the account in order to retain the assets, for he must admit an account to be necessary in order to enable him to retain the assets. That is my view of the case. I confess I have not heard anything which justifies me in abandoning that view, beyond a proposition which is to me so novel that I can not accede to it, namely, that there is no fiduciary relation at all between a surviving partner and the executors of a deceased partner. I cannot accede to that, and not acceding to it, it appears to me that Mr. Gye had only one of two courses open to him, namely, that of handing over money he had received from Mr. Hughes, or the deceased partner's share of it, to the executors of the deceased partner, assuming that all accounts had been settled up to that period, or to say, I shall demand an account, and show by an account that the whole of that money is mine. For anything that appears that might have been the actual result.

Upon those grounds, my lords, I confess that I entertain the opinion which I before entertained. But the majority of your lordships taking the other view, the course to be taken will, of course, be to affirm the decision of my noble and learned friend, and to dismiss the appeal, and if it is to be dismissed, I quite agree that it must be with costs.

LORD CHELMSFORD:

My lords, the principal question in this appeal is, whether the appellant, in respect of his advance of £5000 to the respondent,

is entitled to an account of any profits which the respondent may *have made on the transfer to the Lyceum of the company [683 of opera singers engaged for performances at Covent Garden Theatre after the destruction of that theatre. In other words, whether the advance in question was made by the appellant in respect of the performance of operas at Covent Garden Theatre only, or was intended to assist in an undertaking by the respondent to carry on operatic performances generally without restriction to any particular theatre. Upon appeal from the decree of the vice-chancellor (now my noble and learned friend on the woolsack), I was of opinion that the agreement or understanding (for, as I then said, it is difficult to describe it accurately) was altogether specific and local in its character; and in this opinion your lordships unanimously concur.

It was exceedingly difficult for the appellant to contend successfully for a contrary conclusion, when he had in his bill stated that "he entered into partnership with the defendant in the adventure of undertaking the Royal Italian Opera House, Covent Garden, of which a lease was procured to be granted by the proprietors to the defendant in his own name, it being arranged that the plaintiff and the defendant should be jointly and mutually interested in the profits of the said adventure or undertaking," and in his affidavit in support of the motion for a decree he had sworn that "at the beginning of the year 1851 he agreed to join with the defendant in the speculation of undertaking the Royal Italian Opera, Covent Garden, the defendant having previously obtained a lease of the said opera house;" and in his cross-examination upon this affidavit had said: "I state the exact time when I undertook to join the defendant in the speculation of the Royal Italian Opera, Covent Garden. The result of our discussions was, that myself and Sir William De Bathe should join the defendant in carrying on the opera at the Royal Italian Opera House, Covent Garden, for the year 1851."

It was intimated to the counsel, in the course of the argument, that your lordships were agreed upon all the questions raised by the appeal except as to the right of the appellant to an account in respect of Mr. Thistlethwayte's share in the partnership with the respondent. It is impossible not to observe from the facts of the case, that if the statute of limitations does not operate as a bar, *the account will not benefit the appellant [684 in the smallest degree, as it can only be continued down to the time of the destruction of the Covent Garden Theatre, at which time not only had no profits been realized by the undertaking, but it is proved that the loss amounted to upwards of £40,000.

After carefully reconsidering the question, I feel compelled to adhere to the opinion upon which I proceeded in making the

decree appealed from, that the statute of limitations applies to the case, and that the receipt of the money due from Hughes did not prevent the statute from continuing to run. I need not say how very much my confidence in this opinion would have been increased if it had been concurred in by my noble and learned friend on the woolsack. In the judgment of my noble and learned friend there is a remark almost incidentally made, that "the statute of limitations would not apply to a partnership account of this description;" but that the statutes are applicable to the present case appears to me to be clear. The statute 21 Jac. 1, c. 16, s. 8, which limited actions of account to six years after the cause of action, contains an exception of such accounts as concern the trade of merchandise "between merchant and merchant, their factors and servants," as to which there was no statutory bar till the 19 & 20 Vict. c. 97, the 9th section of which act enacts that all actions and suits for such accounts shall be commenced and sued within six years after the cause of such actions or suits. Now, although the action of account at the time of the passing of the statute of James was one of a peculiar description in the courts of common law (which had since become obsolete), the courts of equity, upon bills for an account, considered "that they were bound to act" not merely by analogy to the statute, but, in the words of Lord Redesdale in *Hovenden v. Lord Annesley* ⁽¹⁾, "in obedience to it;" and he adds: "I think the statute must be taken virtually to include courts of equity, for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore it must be taken to have virtually enacted in the same cases a limitation for courts of equity also." *Thus in the cases [685] of *Martin v. Heathcote* ⁽²⁾ and *Barber v. Barber* ⁽³⁾, both of which were cases of bills for an account, and the answers insisted that none of the transactions in respect of which the account was sought occurred within six years before the filing of the bill, the bills were dismissed. It is true that these cases were overruled by *Robinson v. Alexander* ⁽⁴⁾, but only on the ground that they came within the exception of merchants' accounts, which exception (as I have already shown) no longer exists. And in *Foster v. Hodgson* ⁽⁵⁾, upon a bill filed for an account, it appeared upon the face of the bill that more than six years had elapsed since the account stopped, the defendants demurred, it was held to be an answer to the suit, and that as the

(1) 2 Sch. & Lef. 607, 631, *et seq.*

(2) 18 Ves., 286.

(3) 2 Eden, 169.

(4) 2 Cl. & F., 717.

(5) 19 Ves, 180.

fact appeared upon the bill the objection was properly taken by demurrer.

In *Tatam v. Williams* ⁽¹⁾, Vice-Chancellor Wigram dismissed a bill filed by surviving partners against the executors of a deceased partner who had died thirteen years before the institution of the suit, on the ground of lapse of time, observing that he understood "the rule at law now to be settled that if all dealings have ceased for more than six years the statute (even between merchant and merchant, their factors and agents) is a bar to the whole demand, except where the proceeding is an action of account, or perhaps an action on the case for not accounting." And he added: "In this court there is direct and very high authority for the proposition that a court of equity will not after six years' acquiescence, unexplained by circumstances, or countervailed by acknowledgment, decree an account between a surviving partner and the estate of a deceased partner." The authority of these cases cannot be affected by Lord Brougham's observations upon the imperfectly-reported case of *Barber v. Barber* ⁽²⁾, that case having been overruled in the house of lords on the ground (already stated) that it fell within the exception of merchants' accounts in the statute of James. According to the marginal note of *Barber v. Barber* ⁽²⁾ (which must be inaccurate) the master of the rolls held the case not to be within the exception, although excepted by the express words of the statute.

*The above cases show that the limitation to six years [686 of actions of account applies to bills in equity for an account, and there can be no difference in principle between a suit by surviving partners against the executors of a deceased partner and one by the executors of a deceased partner against a surviving partner, which is the present case.

The statute of limitations, then, being applicable, and beginning to run upon the death of Mr. Thistlethwayte in November, 1854, upon what ground is it alleged that it was stopped in its course, and that although six years afterwards elapsed it did not operate as a bar to the suit for an account? The ground taken is, that the debt of £5000 due from Hughes to the partnership was satisfied by the payment of a smaller sum in discharge of his liability in the month of January, 1859, and that the bill was filed in October, 1864, within six years of such payment. Of course, it makes no difference in the case that Hughes paid a smaller sum than was due from him instead of the whole debt. The question to be determined is, whether, when a right to demand an account of a partnership arises, and afterwards six years elapse, the payment, before the expiration

⁽¹⁾ 3 Hare, 347.

⁽²⁾ 18 Ves, 286.

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of the six years, of a debt owing to the partnership when the time of limitation began to run, will take the case out of the statute? Now, in taking the accounts of a partnership all outstanding debts due to the partnership must necessarily enter into the account, and consequently the appellant having a right to demand an account, the debt due from Hughes would have had to be included as part of the partnership assets. The payment of that debt, or the compromise with Hughes (which is the same thing) did not in any way change the nature of the account to which the appellant was entitled; it only realized the assets which, whether outstanding or not, must have been placed to the credit of the partnership. If the effect of the payment of Hughes's debt is to create a new right to an account, then every debt due to a partnership which is received after a dissolution, must, in like manner, give a fresh right to demand an entire account of the whole of the partnership concerns, and this equally whether six years have elapsed or not, after a suit for an account might have been commenced before the debt due to the partnership was received. The consequence of which would be that 687] when a *partnership is dissolved by death, and there are outstanding debts to be collected by the surviving partner, the statute of limitations could never operate as a bar to a suit for an account against him. The payment of a debt due to a partnership cannot affect the rights of the parties arising out of the partnership *inter se*, like the part payment or acknowledgment of a debt, which takes a case out of the statute of limitations as to the debtor, on the ground that he thereby admits the existence of a debt. The right to an account (amongst other things) of an outstanding debt, which must be included in the account as part of the partnership assets to be collected, cannot be affected by payment of that debt which merely converts into realized assets what was previously uncollected, and cannot stop the course of the statute of limitations, which was running against the claim to an account of the partnership concerns.

It was said that upon payment of the debt by Hughes a new right to sue accrued to the appellant. But the right to sue for what? The answer must be, for an account. But that he was entitled to sue for all along, and the account must have included this very debt of Hughes, the receipt of which is supposed to have created a new right to an account. There may be a difficulty in determining what is the right of an executor of a deceased partner (in the case put by my noble and learned friend), where he has allowed the statute of limitations to run against his claim to an account, and a debt has been received by the surviving partner after the six years have elapsed. But this is a difficulty occasioned by his own laches, and I see no reason,

if he thinks that his interest in the sum received has not been absorbed by its application to satisfy debts due from the partnership, why he should not have a right to sue for his share in this sum (a very different thing from a suit for an account of all the partnership transactions), the surviving partner being at liberty to defend himself by alleging and proving that the whole of the sum received had been applied, or was applicable, to the payment of partnership liabilities.

The appellant probably never thought it worth his while to demand an account, because he must have been satisfied that Mr. Thistlethwayte's capital was swallowed up in the total destruction of the theatre. I continue to be of opinion that the statute of *limitations is a bar to the appellants' right to [688 an account, and therefore that on this point also the decree appealed from ought to be affirmed, and the appeal dismissed with costs.

Order of 20th of February, 1867, affirmed, and appeal dismissed with costs.

Lords' Journals, 8th July, 1872.

Solicitor for the Appellant: *Southee.*

Solicitors for the Respondent: *Tamplin & Tayler.*

[Law Reports, 5 House of Lords, 688.]

July 16, 18, 1872.

J. COURT F. GRIER AND OTHERS, Appellants; and ROBERT F. GRIER, Respondent.

"Issue" — "Settle" — Marriage Articles — Settlement of Estate — Landed Estates Court — 21 & 22 Vict. c. 72.

A covenant in marriage articles to settle an estate, after the payment of an annuity to the intended wife, "upon his issue" by the said intended wife, must be construed as a covenant for strict settlement, and excludes the husband from creating charges in favor of younger children.

By articles of marriage it was recited that the intended husband had received a sum of £600 from J. S., his intended wife, and he covenanted to settle upon her an annuity of £60 for her life, to commence from his death, charged upon his lands, with the ordinary powers of distress and entry, and to settle the residue and remainder of his said lands "upon his issue by the said" J. S., his intended wife. There were several children of the marriage. Some years after the marriage he executed a deed by which he charged on his lands various sums of money in favor of younger children, devising the lands themselves to his eldest son and his other sons successively in tail male:

Held, that this deed creating these charges was void, for that the covenant in the articles gave him no power to charge the lands for the benefit of the younger children, and must be interpreted to mean that he would settle the lands in the ordinary form of strict settlement.

The younger children had, in the character of "incumbrancers," obtained an order from the Landed Estates Courts in Ireland for a sale of the lands and a distribution of the money, the produce thereof. This was done. But some time

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afterwards the eldest son, as "owner" of the lands, brought the whole matter by appeal before the Court of Chancery in Ireland, which reversed this order of the Landed Estates Court, and (the money having been brought into court) directed it to be paid out to the eldest son.

In this House the decree of the Court of Appeal was confirmed.

Held, that the Court of Appeal had, under 21 & 22 Vict. c. 72, s. 39, the *Landed 689] Estates Act, full power to set right, in all respects, the decision of the court appealed from, without any necessity for any fresh proceedings.

Per LORD CHELMSFORD: The proviso in the 64th section of that statute is confined to the case of an "owner" not absolutely entitled to the money produced by the sale of the estate.

Observations by Lord Cairns on the manner in which this covenant in the marriage articles would have been executed by the Court of Chancery upon a bill filed for specific performance.

THIS was an appeal from a decision of the Court of Appeal in Chancery in Ireland, by which certain orders of the Landed Estates Court, dated the 23d of January and the 25th of May, 1871, were discharged (¹).

Robert Grier was, in the year 1822, seized of an estate tail in possession of the lands of Garvagh and Gurteen, in the county of Longford, then producing together about £180 a year. He was to receive a sum of £600 with his intended wife, and on the 15th of April, 1822, in contemplation of marriage, he executed articles of marriage, by which, reciting these matters, a jointure of £60 a year was provided for Jane Slemmon, his intended wife. There was a covenant for quiet enjoyment, and then came a covenant in these words: "And moreover, it is farther agreed upon that the said Robert Grier do settle all the residue and remainder of the said lands, houses, and premises, with their issues and profits now arising, or that may hereafter arise from them, upon his issue by the said Jane Slemmon, after the payment of the said sum of £60 a year as a jointure settled by the said Robert Grier on the said Jane Slemmon, his intended wife." This was followed by a covenant for farther assurance framed in the ordinary form. The marriage took place, and there were nine children issue thereof: Robert F. Grier, the eldest son (the respondent), John Court F. Grier (the first appellant), and seven others. Robert F. Grier when about twenty years of age left Ireland for America.

In 1846, Robert Grier, became possessed of the fee in the said lands and premises subject to the jointure to his wife, and in 1861 executed a deed poll by which, after reciting the articles of 1822, he "in execution and performance of the covenants" therein, and subject to the jointure of £60 a year, charged the 690] whole of the *lands and premises with the several sums thereafter mentioned, namely £200 to each of his sons other than his eldest son Robert F. Grier, and the sum of £700 to each of his said daughters as thereafter provided, the charges

(¹) Ir. Rep., 6 Eq., 1.

amounting in the whole to the sum of £4100; subject thereto he conveyed and assured the lands to his eldest son Robert F. Grier in tail male, with like limitations to his other sons successively, and, in default, to his daughters as tenants in common. One of the sons having died, the sum of £200 which had been given to him was divided into four equal shares among Robert Grier's four daughters, making the sum given to each £750 instead of £700.

Most of the charges thus created were afterwards purchased by John Court F. Grier and the other appellants.

Robert Grier (the father) died suddenly in England, on the 19th of January, 1868, leaving his widow him surviving. It was alleged that the income of the lands was insufficient to pay all the charges, and it was determined to sell the lands, and John Court F. Grier accordingly, in February, 1868, presented as "incumbrancer" (he being one of the sons provided for by one of these charges) a petition to the Landed Estates Court praying for a sale of the lands, subject to the jointure, and made Robert F. Grier (the eldest son) a party thereto, as "owner" of the lands. An abstract of the petitioner's title was lodged with the petition. The charge of £4100 was the only incumbrance affecting the lands for which the sale could be ordered in the Landed Estates Court.

On the 13th of February, 1868, an order for sale was made unless within the time therein named cause should be shown to the contrary by Robert F. Grier, after service upon him. The limit of time fixed was twenty-eight days after service, and service upon the widow, Mrs. Grier, and another person named in the order, was to be deemed good service. On the 7th of July, 1868, this conditional order for sale was made absolute (*). The lands were sold, and produced only the sum of £4120, which sum was *lodged in court by the purchaser. On [691 the 22d of June, 1869, the deed of conveyance was duly executed to the purchaser by Judge Lynch, the judge of the Landed Estates Court.

On the 18th of July, 1870, Robert F. Grier (the eldest son) returned to Ireland from America, and on the 26th of November, 1870, served upon all parties concerned a notice of a motion to be made on his behalf in the Landed Estates Court. The notice was in the following form: "That the owner be at liberty to apply to this honorable court, or that this court do forthwith order, that the orders or decisions of this court made

(*) Whether Robert F. Grier received due notice of these proceedings in the Landed Estates Court, was a question raised in the court below; but it became

immaterial by the decision of this house on the validity of the charges created by the deed of 1861.

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in this matter upon the final schedule of incumbrances, whereby or by virtue whereof the several sums of money set out in the schedule to this notice were paid out to the several parties therein respectively named, be reviewed or rescinded; that the sums be redelivered to the credit of the said matter," &c., "or for such other order as this honorable court may be pleased to make." And notice was thereby given that Robert F. Grier would, on affidavits filed by himself, Mr. A. Chartres, and Mrs. Jane Grier (the widow), and other documents, found his application to the court.

The application to the court was founded on affidavits which charged a family conspiracy against Robert F. Grier, who alleged that he had never received a notice of the conditional order for sale, nor knew of the same until his return to Ireland, in July, 1870; that the deed poll of September, 1861, had been executed by Robert Grier without the knowledge or consent of him, the said Robert F. Grier; that according to the covenant of 1822, he was entitled to the estate, and that (subject to the jointure) the lands ought to have been settled upon him and the heirs of his body.

The decision of the Landed Estates Court was adverse to Robert F. Grier, who carried the case by appeal to the Court of Appeal in Chancery in Ireland, where, on the 19th of June 1871, an order was made whereby the orders of the Landed Estates Court directing the sale and distributing the money were discharged, and it was declared that the deed of September, 1861, was not warranted by the articles of 1822, but was invalid; and that, accordingly, on the death of Robert Grier, his eldest son, Robert F. Grier, became entitled to the lands for an estate tail in possession therein, free from the charges created by the said deed.

692] *The money produced by the sale had been brought into court, and was ordered to be paid over to Robert F. Grier.

This was an appeal against this order of June, 1871.

The *Solicitor-General* (Sir G. Jessel), and Mr. J. F. Walker (of the Irish bar), for the Appellants:

The deed of 1861, was in real accordance with the intention of the parties who executed the marriage articles of 1822. There never was any intention to provide exclusively for the eldest son. On the contrary, it must be taken that the parties used the word "issue" in its widest sense, and meant that all the children should receive a benefit. In no part of the marriage articles is there anything which justifies a contrary belief; and when it is recollected that these articles were expressly made in contemplation of marriage, it must be assumed that its object was to provide for all the children of the marriage. The deed

was a *bonâ fide* execution of the purpose of the articles, and a court of equity, recognizing the rule that articles are considered as minutes only of an agreement not to be followed literally, will take a liberal view of its provisions.

In cases of this kind, the rule of the courts is that there shall not be such an estate in the parent as will enable him to defeat the interest of the children. That is, for their general protection. A like rule must in principle be applied as to the eldest son. The lord chancellor (though he admitted that it was with regret) thought that the agreement to settle the lands to which the articles refer, "upon his issue by the said Jane Slemmon," could not be otherwise satisfied than by a strict settlement. But that was to give to the word "issue" a restricted meaning, contrary to the plain intention of the parties, and not required by any inflexible rule of law. "Issue" is a word of flexible meaning, is to be interpreted by the general purport of the instrument where it is found, and in this instrument plainly meant all the children of the marriage. *Dod v. Dod* (¹), and *Hart v. Meddlehurst* (²), do not require that such a construction as that which was adopted in the court below should be put on this word, while other cases justify a liberal construction of it.

*In *Davies v. Davies* (³) there were articles of marriage [693 very similar to these. The husband did not execute any settlement, but mortgaged the property, with notice to the mortgagee of the articles; it was held that the husband only took a life estate, and that there having been notice to the mortgagee, he could not hold as against the issue of the marriage. In *Rochfort v. Fitzmaurice* (⁴) there were post-nuptial articles, the father having then three children, two sons, H. and T., and a daughter, and he covenanted with trustees to settle lands to himself for life, remainder to trustees to preserve, remainder to the use of H., and to permit him to take the rents and profits for his life, remainder to the heirs male of the body of H., remainder to T. in the same form, remainder to unborn sons in strict settlement, remainders over; it was held that H. took only an estate for life. These cases certainly go to impeach the construction put upon the marriage articles in the present case, and to show the desire of the courts to protect, as far as possible, the children generally. Lord Chancellor Sugden there (⁵) speaks of the common form of settlement made upon articles of marriage as being that of strict settlement, but he only means that that is so as affording the means of protecting the issue against the act of the father. He does not mean that all marriage articles

(¹) *Amb.*, 274.

(²) 3 *Atk.*, 371.

(³) 4 *Beav.*, 54.

(⁴) 2 *D. & War.*, 1.

(⁵) *Ibid.*, 18.

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of this sort are to be interpreted so as to give the whole estate to the eldest son alone. In the court below *Trevor v. Trevor* ⁽¹⁾ was relied on, but that case is really inapplicable here; for there the covenant was to settle to the husband for life, to the wife for life, and after her decease to "the heirs male of the body" of the husband and wife. So it was clear beyond dispute that that covenant could not be satisfied except by a strict settlement. But there was another case of the same name in recent times, *Trevor v. Trevor* ⁽²⁾, where in a will a direction was given to settle to the use of G. R. for life, remainder to his "issue in tail male in strict settlement," and in default of such issue, over, and there the intent prevailed over technical words. The words "in tail male" were held to be descriptive, not of the persons, but of the interest they were to take, and, consequently, * the daughters of G. R., he having no sons, were entitled to take as tenants in common. And *Blackburn v. Stables* ⁽³⁾ and *Jerroise v. Duke of Northumberland* ⁽⁴⁾ show that not merely "issue," but "issue in tail male" are not necessarily identical with "heirs male of the body." In *Taggart v. Taggart* ⁽⁵⁾ the land was given to the husband, "the one-half of the said land to be the right title, and interest of the issue, whether son or daughter;" and there no preference was given to the eldest son, but the whole issue, son and daughter, were held to take as tenants in common. In *Hinsel v. Howel* ⁽⁶⁾ Lord Hardwicke, on a difference of expression in two parts of the same marriage articles, treated the two dispositions as different, favored one which created a charge for the benefit of younger children, and referred to a case before Lord Cowper, where a voluntary charge in favor of younger children was sustained, although as he said, some harshness had been used towards the eldest son in effecting it. And in *Roberts v. Kingsley* ⁽⁷⁾ the court considered all the circumstances, and though a settlement was rectified in favor of the eldest son, yet he was compelled to make his election between the advantage he obtained thereby and the benefit he had taken under a will; and even as to the first point, the result of the case was rather to prevent the father obtaining complete control over the estate than to disable the younger children from participating in the property with their eldest brother. A court of equity will even alter a settlement upon a discovery made some time after its execution that there had been a mistake as to the intentions of the parties: *Duke of Bedford v. Marquis of Abercorn* ⁽⁸⁾.

(1) 1 Eq. Cas. Abr., 387; 1 P. Wms., 622.

(2) 1 H. L. Cas., 239

(3) 2 V. & B., 370.

(4) 1 Jac. & W., 570.

(5) 1 Sch. & Lef., 84.

(6) 2 Ves., 358.

(7) 1 Ves., 238.

(8) 1 My. & Cr., 312.

Here the money had been distributed, and the only regular course was to institute a suit to recover it. The Appeal Court had no power to order that it should be paid back.

Mr. *May*, Q.C., and Mr. *Chaworth Ferguson* (both of the Irish Bar) for the Respondent :

The construction of these marriage articles was mistaken in the Landed Estates Court, but has been set right in the Appeal Court. *All the cases now referred to were cited in *West* [695 v. *Holmesdale* ⁽¹⁾] and were epitomised there in the judgment of the lord chancellor, who showed clearly that, where a supposed intent of parties was set up against the ordinary settled technical meaning of the words used, that intent must be plainly manifested on the face of the instrument so that the technical meaning could not be followed without defeating the manifest intent of the parties. That is not so here. The words are the ordinary words of conveyancers and the ordinary forms of conveyancing must be followed in the settlement. If so, then the estate must be settled in the form of strict settlement. There was no pretence for saying that the articles in any way conferred on the father the power to charge the property with portions for younger children. Yet here it was charged with them to the full value of the whole estate, and in effect it might be said to be not given to the eldest son, but given away from him. They commented on the cases which had been cited on the other side, and insisted that unless the ordinary rules of courts of equity in executing settlements were disregarded this deed of September, 1861, must be declared void. There was no plain intent here which would be defeated by giving the words used their strict and proper meaning.

There was nothing in the statute 21 & 22 Vict. c. 72, which rendered it necessary for the respondent to institute a fresh suit. The 39th section of that statute conferred on the court ample powers to rescind or vary its own orders.

Mr. *Walker* replied.

THE LORD CHANCELLOR (Lord *Hatherley*) :

In this case, which is an appeal from a decision of the Court of Appeal in Chancery in Ireland, sitting in effect as a Court of Appeal from the Landed Estates Court in Ireland, the question that arises is this, whether or not the Court of Appeal in Chancery has rightly decided the effect of an agreement contained in the articles or settlement by Mr. Grier, upon his marriage in 1822, with his wife Jane Slenimon, by which he engaged to settle upon the issue of the marriage the lands which were mentioned in that *instrument? That is the real and main question [696

⁽¹⁾ Law Rep., 4 H. L., 543.

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to be decided, although certain other questions have been argued before us, which were raised in the original suit, and have been raised now again before your lordships, as to the jurisdiction of the Landed Estates Court to recall certain moneys which, in pursuance of a sale, which had taken place in that court, of the estate in question, had been first lodged in court and afterwards distributed amongst the several persons who were parties to the discussion before that court, and ultimately before the Court of Appeal in Chancery in Ireland.

Now, the main question arises, as I have said, upon the settlement made upon the marriage of Mr. Grier in April, 1822. His wife has survived him, and is still living. The settlement is certainly somewhat singularly framed. It is not framed in the mode in which one ordinarily finds marriage settlements framed, providing not only for the intended wife but for the issue of the marriage, because the recitals deal with nothing but the intended jointure which was to be given to the wife, and nothing whatever is said with reference to the issue of the marriage, until we come to the close of the articles of settlement and to the covenants contained in that closing part of the instrument. The property seems not to have been of very great value compared with some estates; it is a property producing about £180 a year, and the intended jointure for the wife was to be £60 a year. There is a great deal of unnecessary length employed in making the settlement of the jointure; the indenture first recites the intention to make it, and then, in a somewhat verbose mode, carries that intention into effect. There then follows the usual covenants for quiet enjoyment and for farther assurance. And between these two covenants for quiet enjoyment and for farther assurance, comes the clause which has given rise to all the questions which have been discussed before us.

That clause runs thus: [His lordship read it, see *ante*, p. 689.]

These are all the words which refer to the matter in question. It is, however, a clear and distinct covenant and agreement. It recites that it has been agreed between the parties that this property shall be settled upon the issue of the intended marriage. And the simple point that we have to determine, 697] and which has *been determined in the court in Ireland, is this: In what manner is that engagement to be carried into effect?

That it is an executory engagement of course is quite clear from the frame of it; and this indenture cannot be construed in any other way, as regards this particular part of the case, than as articles of marriage framed according to the ordinary

course, and in a more artistic way than are these articles themselves.

Then the sole question is this: There being no express life estate referred to as that which is to remain or to be implied in the settlor, but there being a simple engagement to settle upon the issue, what would be the direction that the court should give? Now the lord chancellor and Lord Justice Christian were of opinion that they were bound by the authority of a class of cases, referring to this subject, to say that an engagement, made upon marriage, to settle upon the issue of the marriage, is in effect an engagement to settle in the mode in which marriage settlements are ordinarily framed when the issue are intended to take thereunder, namely, by a limitation to the first and other sons in strict settlement according to the ordinary form, and after going through the whole series of sons, giving them successive estates tail, the limitation would follow in the ordinary course to the daughters as tenants in common in tail.

But it was said that the Court of Appeal in Chancery has erred in coming to this conclusion, from want of perceiving that the ground of the whole course of decisions in cases of this description has been, that, when upon a marriage being about to take place a life estate is limited to the intended husband, and the remainder is limited to the issue of the marriage, and words are used which, according to the doctrine of the rule in Shelley's case, would, although the life estate would be expressly limited to the father, be considered so to coalesce with that life estate as to vest in him an immediate estate of inheritance, whether it be in fee simple or in tail; then in order to carry into effect the intent, when the document in question consists of articles which are executory, the court will not allow the actual settlement which has to be made in pursuance of the articles, to be so framed as to bring it within the rule in Shelley's case, or to vest an immediate estate tail in the intended husband, because it had been *held, and most reasonably held, that [698 it would be contrary to the whole intent of an instrument of this description to create an interest which might be immediately destroyed by the intended husband, the first taker, who might effectually bar his issue, should any settlement be made of that description.

It is quite true that that seems to have been the origin of the court carrying into effect settlements which were agreed to be made by articles framed in the manner which has been pointed out, namely, by limiting to the intended husband simply an estate for life, and then proceeding to limit an estate in strict settlement either to the heirs of the body or to the issue, or whatever other phrase may be used with reference to the in-

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terest intended to be conveyed to the issue of the marriage. But, my lords, the point does not rest there; because, although that be the object in view on the part of the courts in directing settlements to be made in this manner, they have also been called upon in cases of this description to construe the meaning of the subsequent limitation for the benefit of the issue of the marriage. And the first question, therefore, undoubtedly is this: are they words used as words of limitation, or are they used as words of purchase? And even if the words would in a deed actually executed be words of limitation, the courts have said: "We will treat them as words of purchase, when the words are contained in articles which are executory, and in an instrument which is framed with the intent of carrying the deed into execution. We will not introduce the very words themselves because the very words themselves in an executory instrument would have the effect of words of limitation; but we will read them as words of purchase. And the question we have to decide, is what those words of purchase mean."

That seems to have been decided in the case of *Dod v. Dod* (1), and to have been referred to by Lord Hardwicke distinctly in *Hart v. Middlehurst* (2). In the latter case Lord Hardwicke had to deal with the expression, "issue of a marriage;" and although in that case there was clearly pointed out, in some of the articles, an intention to put the younger children in the position of takers of the estate in common with their elder brother, because there were distinct suggestions made in the [699] instrument before him with *reference to the younger children, still Lord Hardwicke makes use of this expression: he says, "I have known many cases decided in this court in which a direction to settle upon the issue has been carried into effect by giving successive estates, which, if the entail be not barred, will carry the estate through the whole issue successively, and so carry into effect that which is presumed, by a long series of decisions, to be the true intention of the parties when they were preparing the marriage settlement." So Lord Hardwicke says it would have been, if it had stood upon the word "issue" alone. We find that he is justified in that by the reported case of *Dod v. Dod* (1), and no doubt there were many other cases which are unreported, but which were perfectly within Lord Hardwicke's recollection, in which, there being a direction to settle upon issue, the settlement upon the issue was carried into effect in the manner I have described. In *Dod v. Dod* that was exactly the case. There was a certain power to the parent to appoint, and in default of appointment, then a limitation to the issue; and in executing that limitation to the issue a direction was given

(1) Amb. 274.

(2) 3 Atk. 371.

to carry out the settlement in the mode I have described, giving it to the first and other sons in strict settlement, with remainder ultimately (the daughters being dead without issue) to the right heirs of the father.

I apprehend that you have not solved the question when you simply say that you have arrived at the conclusion that the father is to be reduced to an estate for life, in order that he may not have the power of barring the entail. The court has still to construe the words used, which, as it has determined, must be taken as words of purchase and not as words of limitation; the court has still to decide how it will deal with these words of purchase. Therefore in this case, when you find nothing more than an agreement that the intended husband will make a settlement upon his issue, whatever may be done with respect to his life interest, independently of the point whether or not he will not have his whole life in which to fulfill the covenant, I say independently of that, and supposing the bill to be filed immediately, I apprehend that, looking at the few lines I have read, it would be held that this was in effect a series of limitations by way of settlement not to come into *esse* until the death of the tenant for life. They are engagements *with refer- [700
ence to the remainder after the payment of the jointure, which jointure would not come into effect until after his own death, and, therefore, the proper time for the execution of the covenant would be after his death, although it might be carried into effect by deeds immediately to be prepared under that covenant which would give effect to that life interest and jointure before carrying into effect the limitations in favor of the issue. That being so, it appears to me that the conclusion which the Court of Appeal in Chancery in Ireland came to upon the order of the Landed Estates Court was a correct and just conclusion upon the interpretation of the language of this settlement.

As to the other point which has been raised, it seems to me to be rather an idle contention when you come to consider it. The contention is founded upon the facts of this case, those facts being of this kind, namely, the father having died, and having before his death executed a deed-poll whereby, having seven children, he gave to the daughters charges amounting to £700 each, to the younger sons charges amounting to £200 each, and having, subject to these charges, which amounted altogether to £4100, limited the estate, so far as the sons were concerned, to the sons successively in tail male, with a limitation to the daughters, not exactly in the form I have described, but which it is unnecessary farther to consider; and the father having so arranged the settlement of the estate and then having died, and proceedings having taken place at the instance of one of the

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younger sons in the Landed Estates Court for the purpose of having the estate, sold as an incumbered estate, in order to discharge the incumbrances, and the court having directed a sale accordingly, and the money having been brought into court and distributed, as the court at that time thought the parties were entitled to have it distributed — in payment of the charges in favor of the children, in payment of incumbrances — the question is raised whether or not upon an appeal from that decision and the reversal of that decision, the money could be brought back again into the Landed Estates Court, or whether the right course was not to do that which would have been extremely inconvenient to all parties, namely to have the money handed back to all those parties to whom it had been paid, and to leave the present claimant, who is the eldest son, to obtain 701] *the money back by means of a chancery suit by virtue of a clause contained in the Landed Estates Act.

Now I apprehend that the true view of the proceedings of the Landed Estates Court is this: They sell an estate, and when an estate is sold they have to divide the purchase money among the parties who may ostensibly seem to be entitled. It turns out that some one who has been connected with the suit questions the propriety of the decision which has been come to with reference to the distribution of the money. The policy of the act is to give a full and complete title to the purchaser. The purchaser has nothing to do with any quarrel that may arise as to the purchase money. He pays his money into court and takes his title, which is superior to any difficulty that can be raised — he has a parliamentary title under the act which authorizes the Landed Estates Court to sell the land and give him a clear and distinct title. But when that is done the policy of the act is farther to deal with the money in this way: The money is to be distributed by the court, but, if it has been distributed, and all claims have been settled and disposed of as is believed, between all the parties, yet it should be found out afterwards that there has been some miscarriage in dealing with the money, then, as a greater security to the person who was originally interested in the estate, but who has been divested of his estate by Act of Parliament, and who cannot go against the purchaser because he has a parliamentary title, the interest of the person who was originally entitled to the estate, and whose interest has been overlooked, is wholly centred now in the money and not in the land. It is, therefore, provided that he shall be able to follow that money, and deal with it in the possession of the person to whom it has been paid, just as the land would have been held to be subject to him who had a real interest in the land. But it was never meant to say that that

court, like all other courts when administering justice between parties, subject to appeal, should have its decisions appealed against, and should either, by its own decision, if it was a rehearing, or by the decision of a superior court, if it was an appeal, have its decision reversed, and yet not be able to recall its order until the cause was finally concluded, because it is not concluded until the appeal has been heard, nor is it concluded until the consequences of the appeal are reached, if they [702] are within reach. Of course there may be cases in which it might be difficult so to deal with them. I apprehend that the 39th section of the act simply applies to that state of things—it merely deals with the case of an appeal being allowed. When the appeal has been heard, and when the result of that appeal has been ascertained, the proper course is to undo, as far as you can, any consequence which may have resulted from the erroneous decision, and which is capable of relief.

It appears to me, then, that the most sensible and the most beneficial course for everybody, including those who have to restore the money, is to have the money brought back in order that it may be subjected to the final conclusion arrived at by the court, and that the parties should not be put to the expense of having a new suit entered into, when the matter can be remedied by the court which has already seisin of the cause and jurisdiction over the matter. It seems to me, therefore, that in every respect the eldest son turns out, in accordance with the views of the court below, with which view I think your lordships will concur, to have been entitled to the estate, and that eldest son is now entitled to the money brought back, and, accordingly, that the appeal fails in every respect.

I will just mention one point which has been argued by the solicitor-general, but which really seems to be involved in what I have already said. In itself it would not seem to have much to repose upon in the way of justice or right, namely, the argument that the costs of the sale ought to be deducted as against this gentleman, who is now claiming the money which the sale of the estate produced, because it has been sold, as it is said, for him, and he cannot have the estate sold for his benefit without being subject to the expense of selling it. But this gentleman did not wish the estate to be sold; he wished to have the estate. It has been sold, and the Act of Parliament says that having been sold, sold it must be as regards him and the purchaser. But it does not seem to me to follow as a consequence that he is to be burdened with any of the expenses resulting from the parties selling it without having a title, as it ultimately turns out, to sell it; expenses which have been occasioned in consequence of their desire to have the estate sold, which did not coincide with

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any desire to have the *estate sold on his part. In order to do justice to him you must give him back, as far as you can, the value of the estate. The estate he cannot have; he would have had it if he could, but the Act of Parliament precludes his having it. The estate has passed away, and the value of the estate, that is, the money which the purchaser has given for the estate, has come in its place, and that he ought to have.

It seems to me that on every point the appellant fails, and that therefore our only course will be to affirm the order of the court below, and to dismiss the appeal with costs.

LORD CHELMSFORD :

My lords, the first question to be considered in this case is, whether the deed-poll executed by Robert Grier on the 5th of September, 1861, by which he charged his estate with different sums of money, amounting in the whole to £4100, for his younger children, and gave the lands themselves in succession to his first and other sons in tail and to his daughters as tenants in common, is a good execution and performance of the covenant contained in his marriage articles of the 15th of April, 1822, by which he agreed to settle the same upon his issue by his intended wife.

It has been observed that the covenant in question is contained in an unusual part of the marriage articles; but this circumstance does not in the slightest degree affect its construction. The question is, whether it warranted the creation of charges in favor of the younger children of the marriage, which by the deed-poll in question the settlor created to nearly the whole value of the property.

It is in some degree a new question, as the cases which have been decided upon executory trusts in marriage articles carried into effect by the decree of a court of equity, have little or no application. In such cases the court acts upon the presumed intention of the parties to the articles, to make such a provision for the issue of the marriage as it would not be in the power of either parent to defeat. And, therefore, where the estate of either parent is by the articles agreed to be settled to himself or herself for life, with remainder to the heirs of the body, or to the issue of the parent who has the estate for life (with certain well known exceptions), *the court, in carrying the articles into execution, will decree it to be done in the surest manner to protect the interests of the children. But in this case Robert Grier had no life estate, either by reservation or by implication, which could coalesce with any estate which he might give to the issue of the marriage. He entered into a covenant or agreement that he would settle all the residue and

remainder of the estate, after satisfaction of his intended wife's jointure, upon his issue by her. He had the whole of his life in which to perform this covenant; and nearly forty years afterwards, referring to this covenant, and expressing that he was acting in execution and performance of it, he executed the deed-poll by which he charged the estate in favor of his younger children with various sums of money amounting to £4100; and in farther execution and performance of the covenant, settled and conveyed the estate in succession to his first and other sons in tail male, and to his daughters as tenants in common.

Now was this a proper performance of his covenant? The question is not as to protecting the issue of the marriage by giving a meaning to the word "issue," but what would be the construction of the covenant by a court of equity if a suit had been instituted for specific performance. The word "issue" in a marriage settlement seems to have acquired a particular sense as applicable to lands, denoting an order of succession of lineal descendants to the estate comprised in the settlement; and by itself, and without some explanatory words to affix to it a different meaning, I think it cannot be interpreted as intending all the issue together and contemporaneously. The deed-poll of 1861 settles the estate exactly in the way that the court would have decreed the covenant to be specifically performed; but it first gives the value of the estate to the younger children, which was *ultra vires*. The settlement of the estate itself is therefore good, but the charges are void.

This view of the effect of the deed-poll shows that the proceedings in the Landed Estates Court were, from the commencement, without any foundation. The petition for sale of an incumbered estate must be made to the court by an incumbrancer; and, accordingly, John Court Ferguson Grier petitioned as an "incumbrancer" for the sale of the lands in question. But he was not an incumbrancer, and therefore there was no valid petition. But a sale of the lands having been decreed by the Landed Estates Court, the decree is final: the lands have been conveyed to the purchaser, and the greater part of the purchase-money has been distributed amongst persons who have no right to it. The second question then arises, whether the proceeding taken by the former owner of the estate, to obtain a decree for a restitution of the money, to which he has an undoubted right, is regular and proper. I do not enter into the question of the supposed delay on the part of Robert Ferguson Grier, with alleged knowledge of the deed-poll and of the proceedings in the Landed Estates Court, upon which I agree entirely with the view of the lord chancellor of Ireland. But it is said that the only mode of obtaining the money to which the

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respondent is entitled is, according to the 64th section of the act, by a suit in equity. That section provides that if by mistake or otherwise any purchase-money shall have been paid to any person not entitled to it, it shall be deemed to have been paid to him upon an express trust to invest the same in the purchase of lands to be settled to the "uses, &c., upon which the lands sold stood limited and settled at the time of the sale." It appears to me that by this proviso a trust is fastened upon the person improperly receiving the money, for the benefit of the person entitled to it; but I find nothing in the section to prevent the person to whom the money belongs from having the money itself if he prefers it. The preceding part of the section enacts that the court shall, out of the purchase-money, pay the costs and expenses, and the incumbrances, and the surplus to the owner, if absolutely entitled thereto; or, where not so absolutely entitled, to be laid out in the purchase of land. The proviso, therefore, taking the whole section together, must be confined to the case of an owner not absolutely entitled to the money.

The 39th section enables the court to rescind or vary any order which has been previously made, without any limitation as to time; consequently, when the respondent discovered that money which ought to have been paid to him had, by an order of the court, been wrongfully received by a person who had improperly set the court in motion, he had a right to resort to the court and ask it to redress the injustice which it had unconsciously committed, and enable him to obtain a restitution of *the money which, if the court had known the truth, it never would have ordered to be paid. I think that the order appealed from ought to be affirmed.

LORD COLONSAY concurred.

LORD CAIRNS:

My lords if after the marriage this case had arisen, if some person had come into being who was interested in the performance of this covenant, and a bill had been filed in the Court of Chancery for specific performance of the covenant, no doubt can be entertained but that the Court of Chancery would have directed a specific performance of the articles by ordering the settlement of the estate in question to be made according to the proper construction of the words in the covenant. The Court of Chancery would not have left the question to remain upon the covenant, although in executing the articles it would not have taken away from the husband of the marriage any interest which he might have been entitled to retain during his life. On that question, my lords, I apprehend that there can be no doubt.

Neither do I think there can be any doubt but that in direct-

ing a settlement of the property the Court of Chancery would have reserved to the husband an estate for his life, and would not have created immediate interests in the children. That is itself a provision which is of the essence, one may say, of a marriage arrangement of this kind; and the strong *à priori* probability of such a provision is put beyond doubt in the present case by the form of the covenant; because whatever interest was to be raised in favor of the issue was to be an interest in the property after payment of the jointure to the wife, a jointure which, of course, was not to begin until the death of the husband. I think, therefore, that the second point is as clear as the first, and that the Court of Chancery, in executing these articles, would have retained to the father, or given to the father, by way of use or resulting use, a life interest in the property.

My lords, the next point, which does not seem to me to admit of doubt, is this; that in executing this provision in the marriage articles the Court of Chancery would have made, under the term **"issue,"* a provision in some way or other for the whole [707 of the children of the marriage, both male and female.

Then the fourth point is equally clear, that a provision for the children of the marriage, male and female, would have been made by the Court of Chancery by raising and creating estates tail; because otherwise the first line only would have been provided for, whereas the term *"issue,"* as we know, includes descendants *ad infinitum*.

Now these points being, as it seems to me, beyond all doubt, the only question in the case which then remains to be determined is this: would the interest thus created by way of estates tail in the children of the marriage have been created by giving estates tail to the children concurrently, or would it have been created by giving estates tail to them successively? In either case you provide for the children of the marriage or the issue of the marriage, *ad infinitum*. Of course the results practically may be extremely different, according to whether they take their estates tail in the first instance concurrently, or whether they take those estates tail successively.

Now in solving that, which is the only difficulty in the case, I entirely agree with the observation made in the court below, that great weight is to be attributed to the term which is used, namely, *"settle."* As I understand that word it must mean this, that the husband agrees to settle — that is to say, to make a settlement of — the property upon the issue of the marriage. And that being the meaning of the word *"settled,"* I hold it to be an established rule, established by a line of cases which cannot be overthrown now except by legislation, that when, after a life estate is either given or reserved to the father upon the oc-

casion of a marriage, there is a contract to make a settlement of real estate upon the issue of the marriage, that must be effected by giving successive estates tail to the children of the marriage. My lords, that is well settled by the cases referred to in the judgment of the court below. And if we were curious to know what the reason of these decisions has been, it seems to me that the reason is perfectly clear, and it is this — that the rule which the Court of Chancery has laid down for itself is, in limiting estates by way of purchase to the issue of a marriage, 708] to go as near as possible to that line of *devolution of the property which would have taken place if the father in the first instance had remained the proprietor of an estate tail. In that case the estate would have gone first to the sons in succession, and then to the daughters as heirs of tail together. And while the Court of Chancery secures to the children estates by way of purchase, which cannot be defeated by the parent it preserves at the same time the line of devolution, *cy-près*, as near as possible to that line which would have been followed if the father had taken first an estate tail.

My lords, the authorities appear to me clearly to establish that proposition; and I should not desire to express my reasons for the conclusion I arrive at in words more apposite than those which are used by Lord Justice Christian. He says: "How, then, would the Court of Chancery execute the articles of 1822? I shall not recapitulate the familiar cases that were referred to during the argument. The respondent's counsel objected that they were mostly of the class referred to by Mr. Fearne in treating of the rule in *Shelley's Case*, and that what they show is what estate the father shall *not* take, not what estate the issue *shall* take. But in my mind they show both these things — that is to say, that the estate tail, which must be lodged somewhere, shall *not* be raised in the father, but *shall* be raised in the children, and in order of seniority, 'issue' in such articles like 'heirs of the body' meaning all lineal descendants, and an estate in tail supplies the only legal mechanism by which the subject can be carried down through that line; that estate must not be raised in the father, the authorities are clear upon that. Only two other methods are open, viz., either to the first and other sons successively, according to seniority, in tail, remainder to the daughters in common in tail, with cross-remainders between them; or else to all the children, male and female, in common in tail, with cross-remainders. The former I take to be the established form of limitation in the absence of express provision to the contrary."

Well, my lords, having disposed of the only question in doubt in the case, I merely observe farther, that the deed in this case,

executed by the father in 1861, is a deed which created in the eldest son an estate tail (we need not go farther than that for the present purpose), and so far it was a good execution of the articles. *But, in my opinion, so far as, beyond that; it [709 imposed charges in favor of the younger children that deed can in no view of the case be supported. It could not be supported if the proper construction of the articles was to require a tenancy in common in tail of all the children. It could not be supported if the proper construction of the articles was that there should be a tenancy in tail of the eldest son, because it has been well decided that where there is a contract merely to settle upon the eldest son as heir of tail, there is no power in the court to award portions to the younger children, unless there is in the articles some provision for that purpose, or some reference to some other document which can enable the court to ascertain what the amount of such provision ought to be.

My lords, I think, therefore, that in substance the decree of the Court of Appeal in Chancery in Ireland declaring that the charges made by the deed of 1861 were invalid, and that the eldest son became on the death of his father tenant in tail, was entirely correct.

My lords, as to the question of procedure which has been raised in this case, it appears to me to admit of no doubt. Beyond all question the object of the Landed Estates Act was to effect a sale of incumbered estates as soon as possible, and to give to the purchaser an absolute indefeasible title, which nothing could take away from him. Beyond that—there was no object whatever in giving a parliamentary title to the persons among whom the money was distributed. Those persons took their money under the act as if they took it under a decree of the Court of Chancery, to which they were all parties. An appeal is given by the act against an order of the Landed Estates Court distributing the money, but that appeal would be perfectly illusory and nugatory unless the Court of Appeal had the right of undoing and setting straight what the court below had done. It is of the essence of a right of appeal that the Appellate Court should have the power to bring back anything which has gone astray under the order of the court below, that it should have the power to bring back money which has been paid to a wrong hand, and to put that money into the right hand. In this case it appears that in substance the persons among whom the money was distributed were parties to *the whole pro- [710 ceeding. I find that upon the present appeal before your lordships, with the exception of one or two persons, the appellants are the very persons who received the money. Those who received the whole bulk of the money are here at your lordships'

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to be decided, although certain other questions have been argued before us, which were raised in the original suit, and have been raised now again before your lordships, as to the jurisdiction of the Landed Estates Court to recall certain moneys which, in pursuance of a sale, which had taken place in that court, of the estate in question, had been first lodged in court and afterwards distributed amongst the several persons who were parties to the discussion before that court, and ultimately before the Court of Appeal in Chancery in Ireland.

Now, the main question arises, as I have said, upon the settlement made upon the marriage of Mr. Grier in April, 1822. His wife has survived him, and is still living. The settlement is certainly somewhat singularly framed. It is not framed in the mode in which one ordinarily finds marriage settlements framed, providing not only for the intended wife but for the issue of the marriage, because the recitals deal with nothing but the intended jointure which was to be given to the wife, and nothing whatever is said with reference to the issue of the marriage, until we come to the close of the articles of settlement and to the covenants contained in that closing part of the instrument. The property seems not to have been of very great value compared with some estates; it is a property producing about £180 a year, and the intended jointure for the wife was to be £60 a year. There is a great deal of unnecessary length employed in making the settlement of the jointure; the indenture first recites the intention to make it, and then, in a somewhat verbose mode, carries that intention into effect. There then follows the usual covenants for quiet enjoyment and for farther assurance. And between these two covenants for quiet enjoyment and for farther assurance, comes the clause which has given rise to all the questions which have been discussed before us.

That clause runs thus: [His lordship read it, see *ante*, p. 689.]

These are all the words which refer to the matter in question. It is, however, a clear and distinct covenant and agreement. It recites that it has been agreed between the parties that this property shall be settled upon the issue of the intended marriage. And the simple point that we have to determine, 697] and which has *been determined in the court in Ireland, is this: In what manner is that engagement to be carried into effect?

That it is an executory engagement of course is quite clear from the frame of it; and this indenture cannot be construed in any other way, as regards this particular part of the case, than as articles of marriage framed according to the ordinary

course, and in a more artistic way than are these articles themselves.

Then the sole question is this: There being no express life estate referred to as that which is to remain or to be implied in the settlor, but there being a simple engagement to settle upon the issue, what would be the direction that the court should give? Now the lord chancellor and Lord Justice Christian were of opinion that they were bound by the authority of a class of cases, referring to this subject, to say that an engagement, made upon marriage, to settle upon the issue of the marriage, is in effect an engagement to settle in the mode in which marriage settlements are ordinarily framed when the issue are intended to take thereunder, namely, by a limitation to the first and other sons in strict settlement according to the ordinary form, and after going through the whole series of sons, giving them successive estates tail, the limitation would follow in the ordinary course to the daughters as tenants in common in tail.

But it was said that the Court of Appeal in Chancery has erred in coming to this conclusion, from want of perceiving that the ground of the whole course of decisions in cases of this description has been, that, when upon a marriage being about to take place a life estate is limited to the intended husband, and the remainder is limited to the issue of the marriage, and words are used which, according to the doctrine of the rule in Shelley's case, would, although the life estate would be expressly limited to the father, be considered so to coalesce with that life estate as to vest in him an immediate estate of inheritance, whether it be in fee simple or in tail; then in order to carry into effect the intent, when the document in question consists of articles which are executory, the court will not allow the actual settlement which has to be made in pursuance of the articles, to be so framed as to bring it within the rule in Shelley's case, or to vest an immediate estate tail in the intended husband, because it had been *held, and most reasonably held, that [698 it would be contrary to the whole intent of an instrument of this description to create an interest which might be immediately destroyed by the intended husband, the first taker, who might effectually bar his issue, should any settlement be made of that description.

It is quite true that that seems to have been the origin of the court carrying into effect settlements which were agreed to be made by articles framed in the manner which has been pointed out, namely, by limiting to the intended husband simply an estate for life, and then proceeding to limit an estate in strict settlement either to the heirs of the body or to the issue, or whatever other phrase may be used with reference to the in-

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terest intended to be conveyed to the issue of the marriage. But, my lords, the point does not rest there; because, although that be the object in view on the part of the courts in directing settlements to be made in this manner, they have also been called upon in cases of this description to construe the meaning of the subsequent limitation for the benefit of the issue of the marriage. And the first question, therefore, undoubtedly is this: are they words used as words of limitation, or are they used as words of purchase? And even if the words would in a deed actually executed be words of limitation, the courts have said: "We will treat them as words of purchase, when the words are contained in articles which are executory, and in an instrument which is framed with the intent of carrying the deed into execution. We will not introduce the very words themselves because the very words themselves in an executory instrument would have the effect of words of limitation; but we will read them as words of purchase. And the question we have to decide, is what those words of purchase mean."

That seems to have been decided in the case of *Dod v. Dod* (¹), and to have been referred to by Lord Hardwicke distinctly in *Hart v. Middlehurst* (²). In the latter case Lord Hardwicke had to deal with the expression, "issue of a marriage;" and although in that case there was clearly pointed out, in some of the articles, an intention to put the younger children in the position of takers of the estate in common with their elder brother, because there were distinct suggestions made in the 699] instrument before him with *reference to the younger children, still Lord Hardwicke makes use of this expression: he says, "I have known many cases decided in this court in which a direction to settle upon the issue has been carried into effect by giving successive estates, which, if the entail be not barred, will carry the estate through the whole issue successively, and so carry into effect that which is presumed, by a long series of decisions, to be the true intention of the parties when they were preparing the marriage settlement." So Lord Hardwicke says it would have been, if it had stood upon the word "issue" alone. We find that he is justified in that by the reported case of *Dod v. Dod* (¹), and no doubt there were many other cases which are unreported, but which were perfectly within Lord Hardwicke's recollection, in which, there being a direction to settle upon issue, the settlement upon the issue was carried into effect in the manner I have described. In *Dod v. Dod* that was exactly the case. There was a certain power to the parent to appoint, and in default of appointment, then a limitation to the issue; and in executing that limitation to the issue a direction was given

(¹) Amb. 274.(²) 3 Atk. 371.

to carry out the settlement in the mode I have described, giving it to the first and other sons in strict settlement, with remainder ultimately (the daughters being dead without issue) to the right heirs of the father.

I apprehend that you have not solved the question when you simply say that you have arrived at the conclusion that the father is to be reduced to an estate for life, in order that he may not have the power of barring the entail. The court has still to construe the words used, which, as it has determined, must be taken as words of purchase and not as words of limitation; the court has still to decide how it will deal with these words of purchase. Therefore in this case, when you find nothing more than an agreement that the intended husband will make a settlement upon his issue, whatever may be done with respect to his life interest, independently of the point whether or not he will not have his whole life in which to fulfill the covenant, I say independently of that, and supposing the bill to be filed immediately, I apprehend that, looking at the few lines I have read, it would be held that this was in effect a series of limitations by way of settlement not to come into *esse* until the death of the tenant for life. They are engagements *with refer- [700
ence to the remainder after the payment of the jointure, which jointure would not come into effect until after his own death, and, therefore, the proper time for the execution of the covenant would be after his death, although it might be carried into effect by deeds immediately to be prepared under that covenant which would give effect to that life interest and jointure before carrying into effect the limitations in favor of the issue. That being so, it appears to me that the conclusion which the Court of Appeal in Chancery in Ireland came to upon the order of the Landed Estates Court was a correct and just conclusion upon the interpretation of the language of this settlement.

As to the other point which has been raised, it seems to me to be rather an idle contention when you come to consider it. The contention is founded upon the facts of this case, those facts being of this kind, namely, the father having died, and having before his death executed a deed-poll whereby, having seven children, he gave to the daughters charges amounting to £700 each, to the younger sons charges amounting to £200 each, and having, subject to these charges, which amounted altogether to £4100, limited the estate, so far as the sons were concerned, to the sons successively in tail male, with a limitation to the daughters, not exactly in the form I have described, but which it is unnecessary farther to consider; and the father having so arranged the settlement of the estate and then having died, and proceedings having taken place at the instance of one of the

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which clearly proved that the "overplus" was to belong to them, certain rates there mentioned were to be paid in another manner. These decisions therefore showed that but for the special circumstances connected with the gifts, distinctly indicating what has been the intention of the testator, the whole fund would have gone to charity. There is no such indication of a special intention in the present case, and *The Attorney-General v. The Mayor of Bristol* ⁽¹⁾, where the gift did not exhaust the whole fund, is therefore inapplicable here. On the contrary, the whole purpose is charity, and where there is one great purpose indicated in such a will, all the smaller incidents which depend upon it must follow its course: *Adams and Lambert's Case*, and the cases there collected ⁽²⁾. There, gifts to superstitious uses, impressed others which were incidental to them, with the same character, and the whole went to the king. That is the case here; the repairs of the houses are necessarily incidental to the charitable gift, and may be considered as forming part of the purpose of the gift. The decision in the present case has in substance been overruled by the same judges in a case which subsequently came before them: *The Attorney General v. The Merchant Taylors' Company* ⁽³⁾.

The word "condition" in this will must not be construed as different from the words "intent and purpose." It is not doubted that these words refer to charity, but it is supposed that "condition" here implies a charge or liability which the respondents are bound to undertake, even to their own loss, 6] and that therefore *they are* entitled to the profit of the increased income. But the word "condition" does not impose such an obligation. In former times that word was constantly used as the ordinary style of speech in creating a trust; *Duke, Charitable Uses* ⁽⁴⁾: and very recently in *Wright v. Wilkin* ⁽⁵⁾, and it must here receive that construction.

As to the second point, the Wax Chandlers were in possession of the rents and profits of the property. After paying specific sums in charity, they kept the residue in their own hands. They purchased property immediately adjoining the charity property, touching it and almost surrounded by it, and joined the two together. It must be assumed this was done with the charity funds, and the added property, like the rest, must be treated as the charity property.

Sir R. Baggalay, Q. C., and Mr. Charles Browne, for the Respondents:

If the rule that the intention of the testator is to govern the

⁽¹⁾ 2 Jac. & W., 291.

⁽³⁾ Law. Rep. 11 Eq., 35; 6 Ch. Ap. 512.

⁽²⁾ 4 Co. Rep., 96, 114, 116, *et seq.*

⁽⁴⁾ By Bridgman, 128, 124 137

⁽⁵⁾ 2 Best & S., 232.

construction of his will (and Lord Eldon in *the Attorney-General v. The Mayor of Bristol* ⁽¹⁾), declared that to be the only proper rule), is applied to this case, the judgment of the court below must be sustained. Kendall was a member of the Wax Chandlers' Company, trusted it, and had an affection for it, as is shown by his gift to the poor members of the company. He intended to impose a trust upon it, but not a burden; he meant that the performance of the trust should be attended by compensation to those who performed it, and therefore gave to the master and wardens of the company, as he did to the churchwardens of the two parishes, a reward for their trouble. But he did not mean to cast on the Wax Chandlers' Company the burden of maintaining his houses in repair without furnishing some funds to meet those repairs. The property was to be subject to the charges imposed on it, which charges amounted altogether to £8 a year. At the time the will was made the houses produced £9 4s. a year; but an inquisition, *post mortem*, taken in June, 1567, expressly states that at that time these premises "were worth in all their revenues, beyond reprises, £16 a year." It is impossible to believe that the testator did not know *that [7 the premises were worth more than they actually produced to him, and that he did not intend to give all that surplus to the Wax Chandlers, whom he intrusted with the distribution of his charities, and whom he put under the "condition" of keeping his houses in repair. That he thought the houses worth more than they then produced, and that to lose them would be a real loss to their possessors, is shown by the fact that he attached the penalty of forfeiture of the houses to the fault of a non-compliance with his will. This forfeiture of the property would have been no penalty but an advantage, if the burden of sustaining the houses was always to be greater than the surplus obtained from the rents, or even if the whole of that surplus, whatever it might become, was required to be applied to sustaining the houses. The cases relied on by the other side do not affect the present, for in them an intention to give the whole income to charity was plainly manifested, and being so, of course the increase of the income went to charity. It is not so here. It is admitted that in many cases the word "condition" may be treated as equivalent to trust; but it is not so here. The words here are more favorable to the Wax Chandlers' Company for the purpose of creating a gift of the surplus than they were in the case of *The Attorney General v. The Corporation of Beverley* ⁽²⁾, or *The Attorney General v. Brazen-nose College* ⁽³⁾, and yet in both those the intention of the testator, as manifested by the general terms of the will, was held to

(1) 2 Jac. & W., 317.

(2) 6 H. L. C., 310.

(3) 2 Cl. & F., 295.

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govern the application of the property. The general intention here was that of a gift to the company in the confidence that the trusts created by the testator would be discharged by the company, which is therefore entitled to the surplus after the performance of those trusts. The belief of the Wax Chandlers that they were the owners of the property, subject only to the trusts specifically imposed upon them, was shown by the fact that when the great fire of London happened, and these premises were burnt, the Wax Chandlers, out of their own funds, rebuilt them. There was, therefore, as in the case of *The Attorney General v. Brazennose College* ⁽¹⁾ conduct which ought to be taken into consideration in estimating what had always been deemed to be the intention of the testator.

8] *The case of *The Merchant Taylors' Company v. The Attorney General* ⁽²⁾ does not overrule the decision in the present case, for, as the argument on the part of the attorney general there showed, that case and this are plainly distinguishable from each other. The form of the gift was different, and the liability of the company was different, and, as was remarked there, while the gift over, in case of default in performance of the trusts, was to persons who could not take beneficially, here it was to the next of kin, who must have taken beneficially. It is clear, therefore, that the testator intended that those who were to have the surplus were to take a benefit. There is here no indication that the testator intended the whole of the property to go to charity. On the contrary, he created a condition and imposed a duty, and gave the residue as the means of satisfying both: *The Attorney General v. The Cordwainers' Company* ⁽³⁾. Upon this principle in *The Attorney General v. Trinity College, Cambridge* ⁽⁴⁾, where was no specific gift of the residue to the college, it was held entitled, after performing the charitable trusts, to keep the increased profits, and *The Attorney General v. Jesus College, Oxford* ⁽⁵⁾ was decided the other way solely because it was clear from the words of the will that the whole fund had been exhausted in the different gifts to charity.

As to the second point, there is not the least evidence to show that the additional property was purchased with income derived from the funds of the charity. On the contrary, there was a loan made to the company, and afterwards repaid by the company out of its general income. This additional property indisputably belongs to the respondents.

Mr. Vaughan Hawkins replied.

⁽¹⁾ 2 Cl. & F., 295.

⁽²⁾ Law Rep. 11 Eq., 35, 39; 6 Ch. Ap., 512.

⁽³⁾ 3 My. & K., 534.

⁽⁴⁾ 24 Beav., 383.

⁽⁵⁾ 20 Beav., 163.

LORD CHELMSFORD:

My lords, upon this appeal two questions have been raised; first, whether the respondents, the master and the wardens of the Wax Chandlers' Company, are beneficially entitled to the rents and *profits of certain houses and tenements devised to [9] them by the will of William Kendall, they paying and distributing certain sums to and amongst certain specified charitable and other objects, or whether they, the defendants in the information, are trustees of the whole of the rents and profits of the houses merely for charitable purposes; and secondly, if it should be held that the defendants are such trustees, whether a piece of land purchased by them and built upon so as to be intermingled with the charity property, is thereby made part of that property, or continues to belong to them.

There have been numerous decisions upon gifts to charities, some of which are not easily reconcileable with each other; a fact partly to be accounted for from each of them depending upon the construction of the particular instrument of gift, upon which different minds are likely to be struck in a different manner as to the *indicia* of intention in the donor. As the cases resolve themselves into mere questions of intention, not to be gathered from the use of particular expressions occurring here and there, but to be collected from the whole of the instrument, it would seem that little assistance could be obtained from other decisions. But certain general rules have been laid down (not improperly called in the argument canons of constructions) which may be usefully applied to the determination of each particular case, although the proper construction of every instrument must be found within itself.

The rules to be collected from the cases are, as Lord Chancellor Hatherley truly stated, clearly and precisely laid down by Lord St. Leonards in the case of *The Mayor of Southmolton v. The Attorney General* ⁽¹⁾. The only cases which have any bearing upon the present are those where a testator, without expressing any general intention to devote his whole property to charity, has devised it, and required the devisee to give portions of it to certain charitable objects, not exhausting the whole estate, and has either left the residue or surplus undisposed of, or has appropriated it to an object which may or may not require the whole of it to be applied. In the former case of the undisposed of surplus or residue, the devisee, according to the case of *The Attorney General v. The Mayor of Bristol* ⁽²⁾, will take the [10] whole of the property, subject only to the specific appropriation. In the latter case, where the surplus or residue is appropriated to an object which may or may not exhaust the whole of it, the

⁽¹⁾ 5 H. L. C., 1.⁽²⁾ 2 Jac. & W., 291.

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question to whom it belongs is one which depends entirely upon the construction of the instrument of gift, and the discovery of the intention of the testator may occasionally be not unattended with difficulty.

William Kendall, by his will, made on the 31st of January, 1558, says: [His lordship here read the words of the will, see *ante*, p. 2].

These last are the important words of the will, and they are those on which we have now to put a construction.

Upon a consideration of the whole of that devise, does it appear to have been the intention of William Kendall to give his houses and tenements in the Old Change to the Wax Chandlers merely as trustees for the charitable and other objects mentioned in his will, or did he intend them to have the benefit of all the profits that should remain after applying what was necessary to satisfy these objects? Very little (if any) stress can properly be laid upon the words "intent and purpose" and "upon condition" in the will as proof of the testator's intention to create either a trust or a condition. Cases are to be found in which, in gifts of this sort, a condition has been held to be created by the word "intent," and it was not unusual formerly in charitable dispositions to impose trusts in the form of conditions. The master of the rolls in his judgment in this case suggested that the words "intent and purpose" and "upon condition" might be taken distributively; the former words imposing a trust upon the company to make the payments to the specified objects, and the latter creating a condition that they should keep the premises in repair. I am unable to distinguish the devises from each other in the manner proposed. The fund for the charitable purposes and for the repairs is the same, viz. the rents and profits of the houses; for when the testator says "the rest of the profits of the said houses I will shall be bestowed upon the reparations," he clearly shows his intention that the £8 given to the charitable and other objects are to be paid out of those rents and profits. If the payment of the £8 had been an absolute payment to be made by the company, then there would have [11] been *no doubt that the whole would have been condition and not trust, but as the £8 are to be paid out of the rents and profits, and the rest of the profits are to be bestowed upon the repairs, the two portions of the devise must almost necessarily be of the same character.

But it was argued that the clause as to bestowing the rest of the profits upon repairs must be understood with this qualification — so far as it is necessary for repairs to be done; for that it would be unreasonable and absurd to suppose that the whole of the remainder of the property, whatever its value, should be

expended in repairs, whether they were wanted or not. Some time was occupied in showing the value of the houses at the time of the will, and at subsequent periods, but arguments of intention drawn from considerations of the probable increase of value of the property are of little avail. A testator may fairly be presumed to look only to the condition of the property at the time when he is making his will, and as the yearly rental of the houses in question at that time appears to have been £9 4s., subject to a quit rent of 16s., making a net rental of £8 8s. — there is no ground for supposing that the testator, if he had carefully considered the question, would have thought that 8s. a year was an extravagant amount to set apart for repairs.

It is only upon these uncertain conjectures of probable intention that the master of the rolls and the lord chancellor have refused to give effect to the language of the testator according to its natural construction, which “by the rest of the profits” must mean the whole of the rest of the profits after the payment of the £8.

It was observed by the master of the rolls that the testator, being a member of the Wax Chandlers' Company, and having its members before his mind at the time of making his will, they take no benefit under it unless the surplus rents are given to them. But this is assuming, and for the purpose of construing the clause in this sense, that he did intend to give them a benefit. There is no reason why the testator should not have intended merely to show his respect for them, by making them the administrators of his charitable dispositions, and by the annual payment which he directed to be made to the master and wardens of the company. The argument which pressed most strongly upon the master of the rolls **(as he said)* [12] was the gift over to the kindred upon the Wax Chandlers' Company leaving undone any of the things directed to be done by them. His lordship says, “the kindred clearly took the property beneficially.” But I may venture to ask, how is that so clear? One reason he assigns is “because it is expressly given to them, *on condition* that they do the things rehearsed in all points.” But I am led to an opposite conclusion by those very words. The next of kin are to be substituted for the Wax Chandlers in the event of their failing to perform the things the performance of which is imposed upon them. We have seen that the words “on condition” may be expressive of a trust — and when the next of kin are to hold upon condition that they do all things above rehearsed in all points as above rehearsed, they come in the place of the respondents, and are exactly on the same footing as the respondents stood under the will, with

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precisely the same duties imposed upon them, and in the same character.

There can be no doubt that the testator's intention in requiring the profits, after payment of the £8, to be laid out in reparations was, that the houses should always be kept in a sufficient condition to realize the amount which was to be applicable to the charitable objects in his will. The clause providing for the repairs may, therefore, be regarded as accessory to the primary charitable dispositions, and of a similar character with them, whether trust or condition. This is like the cases cited in argument from *Coke's Reports* ⁽¹⁾, wherein were devises of the issues and profits of houses or land part to be applied to superstitious uses, and the residue to the reparation of the subject of the uses, and it was held that the devise of the residue was dependent upon the uses and of the same character; the whole was, therefore, held to be superstitious, and the houses or land were forfeited to the king.

The cases mentioned by Sir Richard Baggallay in his argument of *The Attorney-General v. The Cordwainers' Company* ⁽²⁾, and *The Attorney-General v. The Coopers' Company* ⁽³⁾, are both of them distinguishable from the present case. In the case of *The Cordwainers' Company* the master of the rolls held, that the estate devised to the corporation was given absolutely, and was [13] rather a *gift upon condition than a gift upon trust. And in the case of the *Coopers' Company* (which appears to have been somewhat doubted), the sum of £3 given for the repairs of the houses devised to the company was represented to be an amount remaining after gifts of different sums to different objects, and was to be put into the common box of the company towards the reparations of the houses when need should be, importing that it should go into the funds of the company, and be mixed up with and become part of them.

It seems to me very difficult to distinguish this case from the case of *The Merchant Taylors' Company v. The Attorney-General* ⁽⁴⁾ mentioned in the argument, in which there were unanimous judgments of the master of the rolls, the lord chancellor, and the two lords justices. The devises in both cases are in nearly similar terms, "to the intent and upon condition." The payments to the charitable objects are in both to be made out of the rents and profits, for there is no substantial difference between an express direction to this effect in the *Merchant Taylors' Case* and a necessary implication from the words "rest of the profits" in the present case. And the appropriations of the rents and profits to the repairs of the houses are in both cases undistin-

(1) 4 Co. Rep., 96-114.

(2) 3 My. & K., 554.

(3) 3 Beav., 29.

(4) Law Rep., 6 Ch. Ap., 512.

guishable in terms; the words "the whole residue of the rents and profits" in the one case being identical with the words "the rest of the profits" in the other. And the direction to the *Merchant Taylors' Company* to gather yearly into a whole stock the residue of the rents and profits, and therewith to do and keep the reparations of the tenements devised to them, is exactly equivalent to the expression of the will of the testator in the present case, that the rest of the profits (that is, of course, the yearly profits) shall be bestowed upon the reparations of the houses and tenements.

I have come to the conclusion that the lord chancellor's decree cannot be supported; and I entertain this opinion with the more confidence, as he does not appear to have been strongly impressed with the propriety of the decision of the master of the rolls, all that he could bring himself to say on dismissing the appeal being, "On the whole, I cannot come to the conclusion that the master of the rolls' decision is wrong."

*Upon the minor question in the case, as to the right of [14 the respondents to the piece of land purchased by them in 1790, and since built upon, the buildings erected being partly on the piece of land, and partly on the charity land, I am of opinion that the respondents are entitled to it as their own property. An attempt was made to show that the purchase by the respondents was made out of the rents and profits of the houses devised to them upon the charitable trusts; but this does not appear to me to have been proved. The defendants have, for many years, been treating these rents and profits as their own property, *bonâ fide* believing them to be so. If it could have been proved that any part of the original rents and profits had been expressly applied to the purchase of the land in question, to take it from them now would be virtually to make them account for rents and profits prior to the filing of the information — a mode of dealing with charitable trustees who have acted fairly and honestly, though mistakenly, as to the charity funds not adopted by the Court of Chancery.

I would advise your lordships that the decree of the lord chancellor should be reversed, and that the following declaration should be made by your lordships. I wish to call the particular attention of counsel to this declaration, because it is proposed that it should be handed to them in order that they may suggest any alterations which they think would be necessary in its form.

"Declare that the respondents are trustees of the houses and tenements in the Old Change, in the parish of Mary Magdalene, devised by the will of William Kendall in the information mentioned; and that the whole rents and income of the said property, after providing for the repairs and upholding of the same,

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and subject to the payment of the sum by the said will given to the master and wardens of the Wax Chandlers' Company for the time being, and to a proportionate increase of the said sum with reference to their share of the original rent of the property, and without prejudice to any claim that may be made for a similar payment and increase of the other specific sums of 2s. and 2s. given by the will, ought to be applied for charitable purposes according to a scheme for the regulation and management of the charity to be settled by the Court, having regard to the directions contained in the will:

15] **"Declare that the piece of land in the information mentioned purchased of Deborah King, in 1790, is not, nor are the buildings thereon, subject to the trusts of the said will, or part of the said charity:*

"Declare that the boundaries of the said piece of land ought to be ascertained, and the said piece of land distinguished from the property of the said charity, and directions ought to be given by the court for the future apportionment of the rents of the charity property and the said piece of land, or for the separation and division, at the expense of the respondents, of the said property and piece of land, and the buildings thereon, unless the court shall have laid before it, and shall approve of, proposals on the part of the charity, or of the respondents, for the purchase of the said piece of land or of the charity property (as the case may be):

"Declare that the respondents ought to account for rents and profits of the charity property since the filing of information, such rents and profits to be fixed, if necessary, by apportionment:

"With these declarations remit the case to the Court of Chancery, to do therein as shall be just and consistent with these declarations and this judgment."

LORD COLONSAY:

My lords, I cannot say that I have found this case free from difficulty, or that my opinion has not been in suspense during a considerable part of the argument. But, after very full consideration of the will and of the authorities, I have come to a conclusion satisfactory, at least to my own mind. In construing wills we are aided by certain general canons of construction which are well known; and as to wills which contain charitable bequests, certain rules and principles have been established which ought to be adhered to. This will is of that character; and the question which has to be determined upon a consideration of the whole of that document and of the authorities, is that which has been stated by my noble and learned friend who has just spoken.

The testator begins by giving certain houses to his own son and his heirs, and in default of such issue he directs that the Wax Chandlers are to have the houses "for this intent and purpose." *What is meant by "this intent and purpose." [16 We find following that, what must clearly have been the inductive cause and object in the mind of the testator in making that devise, so far as regards putting the Wax Chandlers' Company in possession of these houses. We see that it was for the application of the rents of those houses to particular purposes, some, if not all of them, being charitable purposes. There are bequests to the poor of two parishes — the one being a parish in the county of Kent, in which the testator had property, and the other being the parish in London in which the tenements in question are situated. And, finally, he directs that "the rest of the profits of the houses and tenements shall be bestowed upon the reparations of the said houses and tenements."

Now upon this passage which I have read certain observations present themselves. In the first place, it is to be deduced from that passage that the payments which he appointed to be made were to be made from the rents of the subject, because he goes on to deal with "the rest of the rents and profits." Therefore it appears from this that the distribution was to be made out of those rents and profits. In the next place, it appears from this that he contemplated a surplus after making these payments, for he says that the surplus is to be applied to the reparation of the houses and tenements. It farther appears that he appropriated that surplus by saying that "the rest of the profits" are to be applied "to the reparation" of the houses and tenements. I think these three propositions arise clearly out of these words in the will.

It has been contended that there is an ambiguity, or a doubt, as to whether "the rest of the profits" could mean the whole remaining portion of the rents of the tenements, and a limitation has been proposed to be put on those words to the effect of holding that they mean the profits so far as may be required for the reparation upon a fair consideration of what that includes; and it is said that he could not have meant an express appropriation of the whole of the rents, because he did not know what these might be, and, indeed, could not possibly know it, because the time was so distant when this part of his will would come into effect. We cannot suppose that he did contemplate that the Wax Chandlers might get the property, because he devises it to them in a certain event, and * having that in [17 his mind he expressly declares what they are to do with the profits when they get them; and there is no part of the will more explicit in regard to this than the provision that the rest of the

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profits are to be bestowed upon the reparation of the houses and tenements.

It is said that it is unreasonable to suppose that a large amount of rents was intended to be so applied. Granted that the testator did not know what the exact amount of the rents might be, that it might be greater or less than would be sufficient for the purpose of the repairs; yet the fact is, that he desired them to be so applied. And when we remember that "reparation" is an expression which must be held to comprehend the restoration of the tenements in the event of any catastrophe befalling the buildings, and when we remember that the same institutions which exist now did not at that time exist for enabling parties to secure themselves against such catastrophies, I cannot think that it was unreasonable that he should devote a greater sum to be applied to reparation, or contemplate that a greater sum would be required for that purpose, than if the buildings had been secured against catastrophies, and there would be only casual repairs required from time to time. At all events he has used the expression "reparation," he has said in express terms that the "rest of the profits" are to be applied to that purpose. The object of putting a limitation on the amount of rents to be so applied is to bring the case within the category of cases where there is a residue not appropriated. But how can that be done where the testator in so many words appropriates the residue and by his will directs the whole of it to be applied in a particular manner? I therefore read this as a will which does deal with, and appropriates, the whole of the rents; and when we see that the rents are to be applied to charitable purposes, and that the rest of the profits are to be applied to maintaining those houses which are to produce the rents that are to be given to charitable purposes, we must regard that reparation as being itself part of the charitable object which the testator contemplates.

The other sentence which has been dealt with as being of importance, is that in which the testator directs that in the event of the company's failing to do any of the things he has desired to be done, his next of kindred shall enter into the houses 18] "upon condition" *that they do those things. It is said that the word "condition" being here used, shows that he intended that his next of kindred, whoever they may be, should hold this property for themselves on the simple condition that they should keep the subjects in repair. I do not see that the word "condition" here introduced is to have that peculiar and technical signification. It is a word which may be perfectly consistent with words of trust; it is a word of popular application also, and I cannot hold that he intended it to be so applied

as to limit the application of the rents in the event of the next of kindred taking the subject.

If that is not the necessary construction of this last clause, then the two arguments on which it was contended that the Wax Chandlers are to have any balance of rents for themselves fall to the ground. I think, therefore, that these two passages which are relied upon, the first as being ambiguous, and the second as throwing light upon the first, and clearing up its ambiguity, fail of the effect sought to be given to them in the argument. There are no precise words such as are required in order to take this case out of that class of cases to which I think it belongs. I think that the declaration that the rents are given for a purpose, and that purpose a charitable purpose, clearly indicates the leading object in the mind of the testator; and to that leading object he directs the application of the whole of the rents and profits of these houses and tenements, and he disposes of the whole of the residue in maintaining those houses and tenements. Under these circumstances I think that the judgment of the noble and learned judges in the courts below must fall to the ground.

On the other question, as to the property purchased, I think that seeing that there is an ambiguity here which might very well be in the minds of the respondents, seeing that they may be held to have been acting in perfect *bonâ fides* in all that they have done, seeing that the view they took is strengthened by the opinions of two noble and learned lords of such eminence in the law as those who have had this case before them, I cannot think that the respondents are to be dealt with as if they had been mal-administering the property. It appears to me, therefore, my lords, that the proposition made by my noble and learned friend upon that subject is that which we ought to adopt.

*LORD CAIRNS:

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My lords, it appears to me that the difficulty, much more apparent than real, which has arisen in this case, has arisen from confounding together two classes of authorities upon subjects of this kind, which, in themselves, are perfectly distinct from each other. There is one well-known class of authorities of this sort. A testator devises to a corporate body or to an individual, landed property, and he affixes to that devise a condition that the corporation or the individual shall at their or his own peril, and if necessary out of their own funds, make certain payments, or a certain payment, to some object of his bounty. In a case of that kind the devisee is said to take the land upon condition. If the devise is accepted, the condition must be fulfilled, and the money must be paid, whether the land devised

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is, or is not, adequate to make the payment. The very statement of a case of that kind implies that the land is the land of the devisee, and that every accretion to the value of the land belongs to the devisee; and that the person or the charity which has the benefit of the condition, which receives the payment mentioned in the condition, has a right to nothing more than that payment. The other class of cases is of this kind. A testator devises property to a corporation, or to an individual, upon trust to apply the rents in a particular manner; and it comes to be a question of construction how the rents under those directions are to be applied; and on construing the will, questions arise as to whether the whole of the rents is, or is not, disposed of; and if all of them are not disposed of in form or in substance, farther questions arise as to what is to be done with the surplus, whether it is meant that the devisee is to have the surplus, or whether it is meant that the surplus is to enure to the benefit of the other objects mentioned in the devise. Cases of that kind are not cases of condition at all, they are cases where the beneficial interest in the land is portioned out among various objects; and the question is what those objects are. As was said by Lord Kingsdown in your lordships' house in the case of the *Dean and Canon of Windsor* ⁽¹⁾, there is the same difference between these two classes of cases as there is 20] between a devise to *A. upon condition that he makes a payment to B., and a devise of land for the benefit of A. and B. together.

Now, my lords, it appears to me that the confusion which has arisen in this case has arisen, as I said, from blending together the two classes of authorities to which I have referred; for I find that my noble and learned friend, the late lord chancellor (Lord Hatherly), in his judgment in this case expresses himself thus ⁽²⁾, and here it is that the condition becomes of importance to be considered: "Will you take a property subject to this condition? You have got to pay the £8 a year. If you do not pay the £8 a year, and if you do not keep the premises in repair, some one else will, but you must take it either for better or worse upon those conditions." Those words describe very clearly and distinctly a case of the first class of authorities to which I referred — a gift upon condition of making a payment; and it would appear, from reading those words, that the decision had been based upon the ground that the will now before us came under that class of authorities. But lower down the lord chancellor continues ⁽³⁾: "I cannot distinguish this case from that class of cases where specific gifts have to be dealt with, and nothing is said about the residue." That is the other

⁽¹⁾ 8 H. L. Cas., 369, 452.⁽²⁾ Law Rep., 5 Ch. Ap., 513.⁽³⁾ Id., Ib.

class of cases, which has no connection whatever with the first. Therefore, resting upon this judgment, I should have been left in doubt as to which of the two classes of authorities the lord chancellor really intended to bring this case under. In a later decision of the master of the rolls, which afterwards came before the Court of Appeal, in the case of the *Merchant Taylors' Company* ⁽¹⁾, the master of the rolls said that this former case of the Wax Chandlers' Company had been decided expressly and solely upon the ground that it was a gift upon condition, and not a gift upon trust.

That leads me to inquire which of these two descriptions is the proper description of this will. If the first be the proper description, if this be a gift upon condition, then the decision of the courts below is unquestionably right, and the respondents are entitled to the property, subject to making the payments. Now, when I turn to the will, what I find is this, the property is devised *in form to the Wax Chandlers' Company. The [2] words "upon condition" no doubt occur in the devise, for it says, "for this intent and purpose, and upon this condition, that they shall yearly distribute eight pounds of lawful money of England after this manner." Then specific objects are mentioned, exhausting the £8; and then the devise continues: "And the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparations of the said houses and tenements." If your lordships were to stop at the end of the first half of the sentence, "for this intent and purpose, and upon this condition, that they shall yearly distribute eight pounds of lawful money," it might be contended that it was a condition that they should make this payment, either out of the land, or out of their own money. But when you add the second half of the sentence, "and the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparations of the said houses and tenements," you are driven, without any choice, to the conclusion that all the different payments are to be made out of the rents and profits, and that there is not a word in the devise making it obligatory upon the Wax Chandlers to pay a shilling if they have not got in their hands sufficient rents and profits arising from these houses and tenements. That at once removes the case out of the description of those cases which I mentioned first, viz., cases where a gift is made upon condition, even although the word "condition" is used, for if I give an estate to A. upon condition that he shall apply the rents for the benefit of B.; that is a gift in trust to all intents and purposes, although the word "condition" is used.

(1) Law Rep., 11 Eq., 85, and 6 Ch.Ap., 512.

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Then, my lords, turning to the will as being governed, as it must be, by the second class of authorities, what do we find? Your lordships find that the estate is vested in the Wax Chandlers' Company; that the rents are to be applied to objects which clearly exhausted the whole of the rents at that time, for it is wrong to alter the words of the residuary gift, and to say that the meaning is that so much of the rents as are necessary shall be applied towards repairs. Those are not the words that the testator has used. He has said, "the rest of the profits of the houses and tenements" shall be applied towards repairs; and it is perfectly clear, that whatever was the value of the property at the time, *whether it was a few shillings or a few pounds, more or less, the mind and opinion of the testator was, that the whole of those rents, after providing for the payment of £8 a year, would be required for the reparation, and, if necessary, the restoration, of the premises. The gift, therefore, is just as if he had said: "I, knowing the value of my property, am of opinion, that after a sufficient sum has been used for keeping the property in repair, there will remain a surplus of £8, and I wish those £8 to be divided in the following way."

My lords, I ask the question, then, first, Is the whole of the rent applied specifically under this will? Clearly it is, the whole is exhausted. Is it to be applied for purposes other than the purposes of the Wax Chandlers' Company? Beyond all doubt, the specific payments amounting to £8 a year are not for the benefit of the Wax Chandlers' Company. It is true that the gift of the residue is what may be termed an impersonal gift. No name, no subject, no individual, is mentioned who is to receive the benefit; but for whose benefit is the property to be repaired? Is it for the benefit of the Wax Chandlers' Company? Clearly not, for these respondents have no interest in the property beyond their interest as trustees. The object of the repairs is to keep the property in that fruit bearing state which will produce the required payments amounting to £8 a year. In other words, the reparations are to be for the benefit, and for the purpose of the charitable gifts mentioned in the first part of the will.

If that is so, the whole of the income is dedicated by the will, and dedicated to purposes of charity, and the case ranges itself under that large and well known class of authorities which declare that when gifts are made for charitable purposes, exhausting the whole of the rents at the time, any subsequent increase of the rents must be devoted to the same charitable purposes.

My lords, the case appears to me an extremely simple one. I greatly regret the amount of litigation which has taken place

with regard to this matter, from the hesitation and vacillation on the part of the court, in this case. We hear that another suit has been instituted by another company to change the position of land which had been surrendered to charity under the pressure of the elder authorities. That suit has come to be heard by a primary *court, and by a court of appeal. This [23 suit has been heard by a primary court and by the first court of appeal, and it is only now that a decree will be made consistent with the earlier authorities.

With regard to the minor part of the case, I can only say that it appears to me that there is no evidence whatever showing that the property of this charity, specifically, was applied in the purchase of what has been termed the minor piece of land which was bought from Deborah King. It may well be that the master and wardens of the Wax Chandlers' Company, being under the impression that the surplus property was theirs, and having it along with their other funds, applied some part of it to that purchase; but there is no evidence ear-marking, tracing, or following the charity money into that purchase. Under those circumstances, to take possession of that new purchase for the purpose of charity would, as it seems to me, be nothing short of following the back rents (as they are termed) received by the charity and taking possession of them at the present time. Of course, in cases of this kind, it has not been the practice of the court to follow back rents.

I am, therefore, of opinion, that the declarations which have been made by my noble and learned friend who spoke first, are, in substance, the declarations which we ought to make. I do not think it is the intention of your lordships in placing these declarations, as we propose to do, in the hands of counsel, that there should be any farther argument upon them, but that any farther observation which it may occur to counsel on either side to make upon these declarations, should be handed in in writing.

*Decree reversed with the declarations proposed
by Lord Chelmsford.*

Lords' Journals, 17th February, 1878.

Solicitor for the Appellant: *Fearon.*

Solicitor for the Respondent: *Horatio Gregory.*

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*[Law Reports, 6 House of Lords, 24.]

Feb. 27, 1878.

CHARLES L. F. GILES and ANNA MARIA his wife Plaintiffs in Error; and ANN MELSOM (widow of JOHN MELSOM), Defendant in Error.

Will—“*Same manner*”—“*So specifically devised.*”

A testator had three sons, John, Thomas, and Robert. He devised to each, in the same form of words, a separate property for life, and after a son's death to his child or children in fee. In case any one of the sons should die without lawful issue, the property of such son was to be divided equally between the two survivors “in the same manner as the estates hereinafter devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned.” At the end of the three devises came the proviso in these terms: “Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises, so specifically devised to such one or more of them so dying, unto his widow and her assigns for and during the term of her natural life.” The youngest son died unmarried. His two brothers divided his property between them. The eldest son died, and after him the second son, each leaving a widow, but no child:

Held, that each widow was entitled to a life estate in all that had been possessed by her husband during his life.

The proviso is a limitation, and must be so construed. “Specifically” means the same thing, whether used in a devise of land or of chattels. “So” in this case is merely descriptive, and is the same as “hereinbefore.” “So specifically” is therefore merely descriptive.

In this will the description was meant to apply whether the property was given directly, as in the first instance, or indirectly, as in the second instance.

The proviso being at the end of all the devises, must have a meaning applicable to all, and not be treated as if placed at the end of one, and thus made applicable to one only.

In this case an action of ejectment had been brought by Ann Melsom against Giles and his wife (previously Anna Maria Melsom) to recover possession of a certain estate to which Anna Maria Melsom claimed to be entitled for life under the following circumstances. By consent of parties, the question in the action was stated in a special case for the opinion of the Court of Common Pleas.

George Melsom the elder (the testator) died possessed of three
25] *estates, at Batheaston, in Somersetshire, at Bradford, in Wilts, and at St. Catherine, in the county of Somerset. By his will, dated the 28th of June, 1842, he devised them to his three sons, John, George and Robert, in the following manner:

“I give and devise my farmhouse, lands, tenements and hereditaments situate at Batheaston, in the county of Somerset, and also one moiety of my farm, &c., called Haugh Farm, situate at Bradford, in the county of Wilts, unto my son John Melsom for his life, and from and after his decease unto and equally

between all and every the child and children of my said son John Melsom, if more than one, their several and respective heirs and assigns, as tenants in common; and, if but one, then to such one child, his or her heirs and assigns for ever: And in case my said son John Melsom shall depart this life without having any lawful issue, then I give and devise the same hereditaments and premises unto and equally between my sons, George Melsom and Robert Melsom, in the same manner as the estates hereinafter devised are limited to them respectively, subject, nevertheless, to the proviso hereinafter mentioned in case my said son John Melsom should leave a widow."

The testator then devised in the same terms other property at Batheaston, and the other moiety of Haugh Farm to his second son George Melsom — and in the same terms he devised to his third son, Robert Melsom, his property at St. Catherine, in the county of Somerset. Each of these devises contained, like the first, a gift to the surviving son or sons, of the property of the son or sons dying unmarried. This part of the will concluded with this proviso, referred to in each of the devises by the same words: "Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises *so specifically devised* to such one or more of them so dying unto his widow and her assigns unto and during the term of her natural life."

The testator died in June, 1843, leaving all his three sons him surviving. His youngest son, Robert, died in September, 1848, a bachelor and intestate.

On the death of Robert, the two surviving sons, John and George, divided his property between them. The eldest, son, John, *died in July, 1861, leaving a widow (Ann Melsom, [26 the present defendant in error) but no children; and George died in August, 1867, leaving a widow (Anna Maria now the plaintiff in error) but no children. On the death of George, Ann Melsom, the widow of John, claimed the moiety which had been held by George, alleging that on the expiration of his life estate it came to John, as heir-at-law of his father, being, in that event, undisposed of by the will.

The case was argued in the Court of Common Pleas, when Lord Chief Justice Bovill and Mr. Justice Brett held that George's widow took a life estate in the moiety of Robert's estate along with her life estate in the property originally devised to George. Mr. Justice Byles dissented, being of opinion that, on the death of George, the moiety he had enjoyed passed to the heir-at-law ⁽¹⁾. In the Court of Exchequer Chamber the judg

(1) Law Rep., 5 C. P., 614.

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ment was supported by Lord Chief Baron Kelly, Mr. Justice Mellor, and Mr. Justice Blackburn, but was reversed by the majority of the judges there, consisting of Barons Bramwell, Channell, Pigot and Cleasby ⁽¹⁾. The case was then brought up to this house.

Mr. *Manisty*, Q.C., and Mr. *Murch*, for the Appellant:

The intention of the testator here was to give to each of the surviving sons the same interest in the deceased brother's property as he had given to each in the property originally devised. He carried out that intention by the use of a simple phrase, quite intelligible to every one — he gave one property "in the same manner" as he did the other. He did not mean that there should be any distinction between the two properties when they fell into possession. He had no intention to die intestate as to any part of his property. He desired to make the same provision for the widow of each of his sons, and not to confine the interest of any widow to that property which had been originally devised to her husband, if by the accident of the death of one son unmarried, each of the surviving sons should succeed to a portion of that deceased brother's estate. Such portion was as specifically devised to each as was the portion originally allotted to him; and his widow succeeded for her life to all his interest. The word "specifically" was only a word des- [27
cribing what the testator had done as to one property, and referred to what he had so done as to the other, in order to show what he intended to do as to the other. Put into a common form of speech, the will meant this — I have given some property specifically to each of my sons. If one of them should die unmarried, I desire that the others should divide the dead man's property between them, and each hold his share of the property in the same manner as he held the property originally devised to him, and that his widow shall have a life estate in it in the same manner as she has a life estate in the property originally devised to her husband.

The following authorities were mentioned: *Jarman* ⁽²⁾; *Broom's Maxims* ⁽³⁾; *In re Palmer* ⁽⁴⁾; *Doe d. Woodall v. Woodall* ⁽⁵⁾; *Ross v. Ross* ⁽⁶⁾.

Sir *J. Karslake*, Q.C., and Mr. *Garth*, Q.C. (Mr. *Biron* was with them) for the Respondent:

It is the proviso which gives the life estate to the widow — it is, therefore, in the language of the proviso that the real extent

⁽¹⁾ Law Rep. 6 C. P., 532.

⁽²⁾ 3 H. & N., 26.

⁽³⁾ 3rd Ed. vol. i., p. 710; vol. ii. p.

⁽⁴⁾ 3 C. B., 349.

661.

⁽⁵⁾ 2 Coll. C. C., 259; see also *Ord v.*

⁽⁶⁾ Page 599 referring to Co. Lit., 159 a. *Ord*, Law Rep. 2 Eq., 393.

of the gift is to be ascertained. Now the words of the proviso are, "in case either of my sons shall leave a widow I give the hereditaments and premises so specifically devised, unto his widow for life." The gift to the widow is really restricted to those specifically devised hereditaments, the restriction being plainly and directly created by the words "so specifically devised." Those words operate like the naming of a person, and they fix the identity of the thing devised. There was but one property specifically devised to each son, and all that the will says is that if a son should succeed to half of his brothers' portion he shall enjoy it as his brother did, and in the same manner. The will carries that property no farther.

"So" is a word of reference to a preceding clause of the will, and can have no meaning, nor will the word "specifically" have any meaning if not thus construed, yet a meaning must be assigned to both these words. It is impossible *to strike [28 them out of the will. Each of them is important; and taken together they exactly describe certain hereditaments, and show that those so described were alone indicated and intended by the testator to pass to the widow. The rest of the property was left to follow the usual course of descent. The testator never intended to describe by the words "so specifically devised" an estate depending on a double contingency, the death of a brother, and his death without lawful issue.

Mr. *Manisty* replied.

THE LORD CHANCELLOR (Lord *Selborne*):

My lords, in this case we have the opinions of the judges in the two courts before which the case has come, equally divided upon the construction of the will; but I am happy to think that there is no similar division of opinion in your lordships' House. My judgment certainly is that the appellants are right, and that a careful adherence to the ordinary and settled principles of construction will necessarily lead to a decision in the appellants' favor. The case may well be decided upon the construction of the proviso taken by itself, and without assuming one way or the other the effect of the words of reference which are in an earlier part. So put, it turns entirely upon the meaning of the words "so specifically devised."

This will contained a gift to each of the testator's three sons, for their respective lives, of certain property described upon the face of the will. In the event of any one or more of those sons dying without leaving issue, there was a gift over to the survivors; but that gift over was subject to be intercepted and postponed by the operation of this so-called proviso, that "in case any or either of my said sons shall depart this life leaving a

widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying unto his widow and her assigns for and during the term of her natural life." We have to deal with that very case. One of the sons never married, but died leaving his two brothers surviving. Each of those brothers, under the operation of those parts of the will about which there was no controversy, became entitled [29] upon his death to a moiety of *that property which in the first instance had been given to him for life. The words which gave that right to the brothers were words which said, that in the event which in Robert's case happened, namely, his dying without leaving lawful issue, "the same last-mentioned hereditaments and premises," being the particular property which had been described in this will by the description of "my farm, messuages, lands, tenements, and hereditaments, with the appurtenances, situate, lying, and being in the parish of St. Catherine, in the said county of Somerset," were given over to the two brothers for their respective lives, and given over to them "in the same manner" as the estates which had been directly, or in the first instance, devised to them respectively.

Now the words here say that if either of those sons should die leaving a widow, which has happened as to both of them, then the testator gives the hereditaments and premises so specifically devised to the person so dying, to his widow for her life, or their widows for their lives. What are the hereditaments and premises so "specifically" devised? All the devises precede that proviso in the will; all of them are devises of property identified by particular descriptions; and, in the events which have happened, the property which, in the first instance, had been given to Robert, had, by virtue of the gift in the preceding part of the will come to the two brothers, to be held by them "in the same manner" as the estates originally given to themselves.

Now, what does the word "specifically" mean? I should have thought that it was one of those words in our language which have an exact and accurate meaning well known to the law; so well known that it may almost with propriety be called a technical word of legal language. A specific devise, or a specific bequest (for the word "specific" means exactly the same thing, whether it be applied to land or to chattels, to heritable estates, or to leaseholds) is a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie. Mr. Baron Channell, in his judgment — and I cannot name that learned judge without expressing the feeling of regret which I am sure all your lordships, and all who are acquainted with the administration of the law in recent

times, must feel at the loss we have sustained by his removal from among us — Mr. Baron Channell *adopts this view, [30 and says that the word “specific” with this meaning applies with propriety to this gift, because the lands were devised by particular description. And Lord Chief Baron Kelly, in two passages of his judgment, with great accuracy says, that that is both the legal and the natural meaning, of the word. In this case the legal meaning comes from the natural meaning and the natural meaning happens to be exact and definite. It is quite clear that this is property defined by specific description existing at the date of the will, and not less so whether it be given directly and in the first instance, or indirectly and in the second instance. The only question which arises is, whether the devise has taken effect upon it? It has taken effect upon it specifically by virtue of that specific description.

I said that the word “specific” was exactly the same in its meaning whether applied to land or to personal estate. It used to be said (and the chief baron takes notice of it) that every devise of land is a specific devise. In the old state of the law that was so, because, by law, no land could pass by a will of which the testator was not seized at the time he made the will; and, therefore, however general the form of expression, it was applicable only to a particular subject identified by the words of description and in existence at the date of the will. I apprehend that that is no longer the case, even as to real estate, in the present condition of the law, which enables a man by general words to give that which he has not at the time when the will is made. Therefore it is no longer necessary that the will should contain specific words applicable to a particular subject in existence at the date of the will, but it is sufficient if it contains words expressive of the same kind of intention which is expressed by a residuary gift of personal estate, namely, that whatever the testator may happen to have, which he is capable of disposing of, answering to the description of realty, shall pass under the will. At the same time it is not necessary to dwell upon any nice or technical criticism in that respect; because, assuming that every devise of real estate is specific, unless we deny the truth of the proposition which I have just stated as being universally true, the words are properly applicable to such devises, and when applied to such devises, they express not an unmeaning thing, but a thing which *has a true meaning, even if [31 it be universal, with respect to a particular class of gifts.

My lords, I cannot but think that it is of very great importance to adhere to the rule that words are to have their natural signification, and that legal and technical words are to have their legal and technical signification, unless there be something in

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the context of a particular instrument to show the contrary. What is there in the context of this particular instrument to show the contrary? It is not very clear; but dealing with these words as they stand, they seem to me to speak for themselves and to involve no difficulty of construction. I am led to follow the argument as to the general scheme of the will. It is, I venture to say, a perilous and hazardous argument in most cases where it is used. I do not say that there are not cases in which it may be properly used, but certainly it is an argument which seeks to escape from the necessity of grappling with the meaning of particular words upon grammatical principles, and endeavors to get into a region of speculation as to the probable intent of the testator. There are cases in which the ambiguity of particular expressions is such that there may be no better mode than that for their construction. But those are not cases one would desire to follow, except where there really is an ambiguity of that kind. However, if I were to attempt to follow the learned counsel in that line of argument, I should say that the general scheme of this will would not lead me to the conclusion that it was intended, as against the widow in this particular case, to separate from the property originally given that which the testator had added to it, by words, saying that it was to be held in the same manner as the estates previously devised. So far as there is a scheme here, it does not show any disposition to deal with that which is added, differently from that which was originally given, as against the devise for the children of the sons. If the words by which the addition is made may admit of some doubt as to whether they would go beyond the sons themselves (I do not say that they do, but it is not a point which it seems to me necessary for us now to decide) certainly the probable intention is, that they were meant to provide for the children as well as for the parents. And if they were meant to provide 32] for the children as well as for the *parents, I can find nothing in this will leading to the conclusion that there was any intention to draw a line adversely to the widows in that case. Therefore, looking through the will, I can see no context which at all requires or justifies a departure from the proper sense, as I understand it, of the words so "specifically devised," which, coming where they do, include everything which had been previously given.

Two arguments were relied upon by the respondents. First of all it was said that this clause being in the shape of a proviso, ought really to be split up into three clauses, and read in that form into earlier parts of the will, with the effect of making the words, "so specifically devised," receive from the context a more limited application than that which they would receive

in the place where they occur. That is a singular mode, certainly, of dealing with the construction, to transpose, without necessity, words from the place where they occur, in order to make a word of reference that is found with them, namely, the word "so," in "so specifically devised," apply to a different subject from that to which it would naturally apply where it is found. Of course, if you put into the clause immediately after the first gift of the estate to John, the words "so specifically devised," in that place, they could only apply to those estates. But you do not find them there. You find them at the end of all the devises; and I quite agree with what Mr. Justice Byles said, that you must deal with them according to the place where you find them, and not according to the supposition that they are somewhere else. So, dealing with them, it appears to me that the words "so specifically devised," mean the same as if the phrase had been "hereinbefore specifically devised;" and, reading it so, I am obliged to inquire whether any reason can be suggested why the testator put it in that place instead of distributing it over other places in the will in the way which has been suggested. I should say the reason was in order to avoid any question as to the way in which the property was to be included, and as to its covering everything. It appears to me that that is its effect.

I do not wish to dwell upon the effect of the words, "in the same manner as the estates herein devised are limited to them respectively." I cannot, however, but say, upon that, that it *seems to have been all but conceded in the arguments of [33 the respondent, and all but decided, certainly assumed, in the opinions of the learned judges who were in favor of the respondent, that those words of reference would have the effect of making the sons tenants for life with remainders to their children, of what they took over under those words. If so, it is wholly impossible that they should not also have the effect of carrying the estate given over, through all the limitations which had been declared, of the estates originally given. And I must confess my total inability to follow the argument, that the limitation is the less a limitation because it is introduced by the word "provided," and occurs in a different part of the will from the other limitations in connection with which it is to be read ultimately, according to its legal effect.

The whole argument for the respondent, if I may say so respectfully, seems to me to lose sight of the cardinal rules of construction, which are, that where you have got words which are sensible and intelligible in their proper and natural meaning, especially if they are words of law and words of art, they are not by any uncertain conjecture to be wrested or diverted from that meaning. You must have clear interpretative words in

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some other part of the will, which make such a construction necessary, in order to put upon them another than their proper sense. As to its being necessary to do that in order to make them effective, in the sense which the argument for the respondent requires, I must demur wholly to the principle. If the words, "so specifically devised," were not according to their true meaning applicable to the particular estates, then we must search for some other meaning for the word "specifically" which would make them applicable. But being applicable, it is no argument to say that, if the word "specifically" had been left out, we should still have known from the rest of the will that these were specific devises. You might just as well say that the words, "without leaving any lawful issue," must receive some other and definite construction, because if the word "lawful" had been left out they would have meant the same thing. Nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning only because those words are superfluous. Here the words 34] have a meaning; it * is an accurate meaning, a well-known meaning, a legal meaning, and a meaning which in the present case can receive effect without the slightest difficulty; and I totally disagree with the opinion that you are to depart from that meaning, and search for some other meaning, merely because the sense would have been practically the same if the words had been left out.

I must, therefore, advise your lordships in this case to reverse the judgment of the court below, and to give judgment in favor of the appellants.

LORD CHELMSFORD :

My lords, I entirely agree with my noble and learned friend in the opinion he has expressed. I should have considered this case to be one perfectly clear of doubt, if it had not been for the difference of opinion which has existed amongst the learned judges in the courts below, and for feeling that there are five very learned judges who have a different opinion to that at which I have arrived.

Without offering any opinion with regard to what may have been the general scheme of the will, I think it will be sufficient for my purpose to state that it is perfectly clear to my mind that it was the intention of the testator to deal with all his three sons in the same manner, and to give them their different estates exactly upon the same terms. The devise to John may be considered as the type of all the rest. What was the nature of the devise of the particular estate to John? It was to him for life; then (as the proviso in favor of the widow must be

considered as a limitation) to the widow for life, and afterwards to the children in fee. Then comes what may be called a contingent devise to George and to Robert, and it is in these terms: "in case my said son John Melsom shall depart this life without leaving any lawful issue, then I give and devise the same hereditaments and premises unto and equally between my sons George Melsom and Robert Melsom, in the same manner as the estates hereinafter devised are limited to them respectively."

Now we will take the devise to George. What is that devise? The devise of the estate to George is exactly the same as the devise of the estate to John. It would be to George for life, to his *widow for life, and afterwards to [35 his children; and then every devise is followed by the words "subject, nevertheless, to the proviso hereinafter mentioned in case my said son John Melsom or George or Robert should leave a widow." Then this contingent devise is made to George (I am taking George at present as being the only important one) "in the same manner as the estates herein devised are limited to them respectively." And having shown that the devise to George was to him for life, to his widow for life, and to his children, then if the contingent estate is limited to him "in the same manner" as the estates devised to him, of course it must be of the same nature; that is to say, to him for life, to his widow for life, and to his children.

Some question has been raised with regard to that contingent devise extending to the children of George and of Robert, but it appears to me that it will be almost unnecessary to consider that question, because whether it extends to them or not, it appears to me that the proviso will undoubtedly give a life estate in the estate contingently devised to the widow of George.

Now all the devises, as I have already mentioned, terminate with a reference to the proviso in favor of the widow. That proviso is "that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying unto his widow and her assigns for and during the term of her natural life." Some of the learned judges have dwelt upon the word "specifically" in this sentence, and have held that it applied to the estates originally devised and did not extend to those which were contingently devised. But really there seems to me to be no reason whatever for that conclusion, because, are the estates which are contingently devised less specifically devised than the estates originally devised? The same estate which is originally devised to each of the sons is afterwards contingently devised and specifically devised to the other

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two sons. Then if that be so, whether the limitation applies to the children or not in the case of the contingent devise, the words of this proviso appear to me to apply in terms to the devise over (the contingent devise) to George and Robert, because it is "in case any or either of my sons shall depart this life 36] leaving a widow" (the case of *George), "then I give the hereditaments and premises so specifically devised" (the hereditaments and premises specifically devised are clearly partly those which are contingently devised) "unto the widow and her assigns for and during the term of her natural life." All these circumstances have occurred in the case of George, and therefore this limitation in favor of the widow appears to me clearly to attach to her; and consequently I agree with my noble and learned friend that the judgment of the court of Exchequer Chamber must be reversed.

LORD COLONSAY concurred.

Judgment reversed; and judgment given for the Plaintiffs in Error, with directions that the Plaintiffs in Error "be restored to all things which they have lost by reason of the said Judgment of the Exchequer Chamber."

Lords' Journals, 27th Feb., 1878.

Attorneys for Plaintiff in Error: *Young, Maples, Tiesdale, Nelson, & Co.*

Attorneys for Defendant in Error: *Merediths, Roberts, & Mills.*

CASES IN THE PRIVY COUNCIL.

[Law Reports, 4 Privy Council, 419.]

J.C., July 4, 5, 6, 1872.

***MOLLWO, MARCH, & Co., Appellants; and THE COURT OF [419
WARDS, Respondents.**

ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM, IN BENGAL.

*Partnership—Agreement with Firm for commission on net profits and Interest—
Cash advances.*

Agreement in writing entered into between W. & Co., British merchants, carrying on business at Calcutta with a Hindoo rajah, by which, in consideration of moneys already advanced, and which might be thereafter advanced by the rajah to them, they agreed to carry on the business subject to the control of the rajah in several particulars; stipulating that the rajah should receive a commission of twenty per cent. on all profits made by the firm, until the whole amount of the debt due to him should be paid off, with twelve per cent. interest upon all cash advances which had been, or might be thereafter, made by him to the firm. Further advances having been made by the rajah to the firm, W. & Co., executed to him a mortgage of certain tea plantations, to secure the then amount of his advances, and the rajah by a deed released his right to commission and interest under the original agreement between them. No proceeds of the business were ever received by the rajah, and though he was credited in the books of the firm with a considerable sum, that sum was never received by him, and was afterwards written back in the books of the firm. The rajah did not interfere or exercise any such control in the business as to make him an ostensible partner in the firm: *Held*, that, having regard to the restrictions and modifications made of late in the rule of law formerly prevailing, that participation in the net proceeds of a business made the participant liable as a partner to third parties, and looking at the whole scope of the agreement, the primary object was to give security to the rajah as a creditor of the firm of W. & Co., and that the participation given him in the net profits of the business was not sufficient to establish a partnership between W. & Co., and the rajah, as regarded third parties.

Although a right to participate in the profits of a trade is a strong test of partnership, and there may be cases where, from such perception alone, it may as a presumption, not of law, but of fact, be enforced; yet, whether that relation does or does not exist, must depend on the real intention and contract of the parties.

The case of *Cox v. Hickman* (¹), and *Bullen v. Sharp* (²), referred to and acted on.

In the absence of any law or established custom existing in India in respect to partnership transactions, the law of England is to be resorted to for principles and rules to guide the courts. At the same time the usages of trade and habits of business of the Indian community, so far as they may be peculiar or differ from those in England, are to be taken into consideration.

THIS was an appeal from a judgment of the High Court at Fort William, in Bengal, in favor of the respondents, reversing

* *Present*:—SIR JAMES WILLIAM COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH and SIR ROBERT PORRETT COLLIER.

(¹) 8 H. L. C., 268.

(²) Law Rep., 1 C. P., 86.

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the decree of the principal Sudder Ameen of the 24 Pergunnahs made in favor of the appellants. •

The suit was brought by the appellants, who were merchants trading in London, against Rajah Pertab Chunder Sing, Bahadur, as being jointly liable with the other persons trading as merchants under the style of Watson & Co., in Calcutta, in respect of the moneys due to the appellants in certain transactions and dealings hereinafter mentioned. The rajah having died after the commencement of the proceedings, the defence of the suit was continued on behalf of his representatives by the court of wards, the respondents in the appeal.

The appellants, before the transactions under which the suit arose, had carried on business as merchants in London, and had had mutual dealings in trade with the firm of W. N. Watson & Co., of Calcutta. The dealings consisted in the plaintiff's firm and the firm of W. N. Watson & Co., mutually consigning goods and merchandize to each other for sale, and in the firm of W. N. Watson & Co. drawing bills of exchange on the appellants against the goods so consigned by them, which were paid by the appellants in London, and in paying moneys on each other's account in the usual course of merchants in correspondence with each other.

On the 19th of June, 1865, there was due to the appellants from the firm of W. N. Watson & Co., a balance of Rs. 2,92,000. 2p. on the account current between the two firms.

The business transactions between the two firms were conducted under the partnership names, but the real question at issue between the parties was, whether or not the rajah was jointly liable as a partner with W. N. Watson and T. O. Watson, who were admitted to have been the partners in the firm of W. N. Watson & Co., to pay the balance claimed, or any part thereof.

[21] *The issues in the suit, as settled by the officiating judge of the Court of the 24 Pergunnahs, were :

First, whether the plaintiffs had dealings with the firm of W. N. Watson & Co., and what was the balance due to the plaintiffs on such dealings and transactions from that firm. Second, whether the rajah, the then defendant, was liable to the plaintiffs as a partner of the firm of W. N. Watson & Co.,; and if so, for what time? Third, being held to be a partner, for what amount was the defendant liable? whether for the whole, or only for a portion?

The judge thought it more expedient to try the second issue first, and this course was accordingly pursued.

On the 30th of November, 1866, Mr. J. Beaufort, the judge of the Court of the 24 Pergunnahs, by his judgment on this

issue, found that the rajah was a partner of the firm of Watson & Co., and that his liability commenced on the 27th of August, 1863, and ceased on the 3rd of March, 1865. The other issues were subsequently tried, and by his judgment, dated the 10th of September, 1868, he found that the appellants were entitled to recover in respect of all the items in the account current except two, which he disallowed for reasons stated in his judgment.

From this judgment an appeal was brought to the High Court of Judicature of Bengal, and a Division Bench, consisting of the Justices Jackson and Markby, reversed the judgment of the Court of the 24 Pergunnahs, holding that the rajah was not liable as a partner, or otherwise, to the appellants for the balance or any part thereof; and from this judgment the present appeal was brought.

The circumstances under which the appellants contended that the rajah was liable were as follows:

T. O. Watson and his son, W. N. Watson, commenced trading in partnership in February, 1862, under the style of W. N. Watson & Co. They had little capital, and finding themselves in want of money, applied to the rajah to assist them. He assisted them during the year 1862, by acceptances, which the Watsons did not meet or provide for; the rajah took them up, and was induced to advance further large sums of money. In January, *1863, he retired an acceptance of Rs.10,000, [422 and others in the following March to the extent of Rs.50,000. In April in that year he advanced Rs.10,000 to the firm, and in the following August Rs.20,000. The business was, in fact, carried on mainly by the rajah's capital.

On the 26th of August, 1863, an agreement, in the following terms, was made between the Watsons and the rajah, although not signed by the rajah: "Memorandum of agreement made between Rajah Pertab Chunder Sing, Bahadoor, of Pykeparrah, in the suburbs of Calcutta, of the one part, and Messrs W. N. Watson & Co., of Calcutta, merchants, of the other part.

"In consideration of certain sums of money already advanced and which may hereafter be advanced by the rajah to Messrs. W. N. Watson & Co., and in consideration of his signing acceptances and other securities for the said W. N. Watson & Co., it is hereby agreed as follows:

"1st. Henceforth the said W. N. Watson & Co. shall not make any shipment without first obtaining the consent of Rajah Pertab Chunder Sing, so long as the said firm shall remain in debt to the rajah, and so long as the liabilities incurred by him in signing acceptances for the firm, or any portion thereof, shall be in existence.

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" 2d. Upon such shipments being made, the shipping documents shall be considered at the disposal of the said Rajah Pertab Chunder Sing, and that the said firm shall not without his consent sell, pledge, or hypothecate them to any person or bank, nor shall the firm apply the proceeds thereof in payment of goods shipped without such consent.

" 3d. Remittances from home in shape of goods will not be ordered by the firm without the consent of the rajah.

" 4th. No consignment of goods shall be ordered from home by the firm without the consent of the rajah in writing.

" 5th. All remittances received by the firm from home, either in money, goods, or otherwise, shall be made over to the rajah, and the same shall be under his control. The firm shall sell the goods with the sanction of the rajah first obtained, and all the proceeds shall, after meeting any debts of the firm to other persons which the rajah may deem urgent, be retained by the [423] *rajah to extinguish in part or in whole the firm's debt to him, or extinguish wholly or in part the liabilities which he has so incurred as aforesaid; if the remittance be in consignment of the goods, all documents belonging to the same shall be handed over duly indorsed by the firm to the rajah, and the same shall be wholly at his disposal for the purpose of extinguishing the said debt and liability, subject only to the limitations just above mentioned.

" 6th. The proceeds of the sale of any goods consigned free to the firm shall also be made over to the rajah, and the proceeds shall be remitted to the consignors with the sanction of the rajah.

" 7th. With regard to the conducting of the office business of the firm in detail, the rajah is to be consulted, and he may direct a reduction or enlargement of the establishment according as he may deem proper.

" 8th. No moneys shall be drawn from the firm for the private expenses of any member thereof, or for the conducting of business of the firm, except such sums as the said rajah shall agree to.

" 9th. The rajah shall have free access to all books, bills, documents, letters, advices, correspondences, and other papers belonging to the firm or relating to its business.

" 10th. In consideration of the said advances made, and the liability incurred as aforesaid by the rajah, and in consideration of any future advances which may be made by him, the firm agrees that he shall receive from them a commission of 20 per cent. on all net profits made by the firm from time to time, commencing from the 1st of May, 1862, or until such time as the whole amount of the debt due to him shall be paid off, and the

liability so incurred by him as aforesaid shall be wholly extinguished.

" 11th. As security to the said rajah for the advances he has made, or which he may hereafter make, and the liability which he has incurred in signing acceptances for the benefit of the said firm, the firm hereby makes over to him the title deeds of their tea plantations at Cachon, called Jeffer Coon Baljore Kishnapore, East Bodreepaul, Central Buddreeparr, and West Buddreeparr, and the firm hereby agrees not to alienate the said plantations until the debts due by them to the rajah are paid off and his said liabilities extinguished, when the said [424 rajah is to return the said title deeds to the firm.

" 12th. As further security to the rajah, the firm agree that their other property, landed or otherwise, including their present and future stock in trade and outstandings, shall be answerable for the debts due to him, and the liability incurred by him as aforesaid.

" 13th. The firm shall in addition to the said commission pay to the rajah interest at the rate of 12 per cent. per annum upon all cash advances which have been or are to be hereafter made by him to the firm, and shall also pay to the banks all discount and interest now as hereafter payable on the said acceptances.

" Dated the 27th day of August, 1863.

" W. A. Wilson.

" T. O. Watson."

Under the 10th clause of this agreement the sum of Rs. 27,458 14a. 4½p. was on the 30th of September, 1863, written over to the credit of the rajah in the books of the firm in a separate account opened in his name, and called "Private Ledger for amount of his gain at 20 per cent. on net profit up to 30th April, 1863, as per Journal, Rs. 27,458. 14a. 4½p."

After the date of this agreement, the rajah advanced further sums of money. He did not avail himself very largely of the powers conferred upon him by the agreement, and he stated himself, that he did not understand much about commercial transactions; but there was evidence that he recommended clerks for employment by the firm; that he took part in dismissing a clerk; that he came to the office frequently, using the room set apart for the members of the firm, and also the room used by the partners to which persons dealing or having business with the firm had access; that the accounts were offered for his inspection; that he inspected samples of cotton; that the communications from England were read to him; that he consulted with the Watsons on the business; and that he

was present when business was transacted, and took part in it.

It appeared that the Watsons held out the rajah to be a partner to the plaintiffs and others. It also appeared that the rajah, subsequently to the entry to his credit of the above sum 425] of *Rs. 27,458. 14a. 4½p., drew against the sum; but it appeared further, that afterwards, in March or April, 1864, this sum was written over to his debit in the books of the firm.

In the years 1864 and 1865, the firm of the Watsons fell into great difficulties, and were, in fact, insolvent. In March, 1865, the rajah executed a deed wherein, *inter alia*, the agreement of the 27th of August, 1863, was recited, and whereby he released and relinquished all claim under the agreement of the 27th of August, 1863, to "the said commission or profits," and all claims to any other moneys, except a sum which was stated in the deed, and which was, by an indenture of even date, secured by a mortgage of the tea plantations at Cachon, under the agreement of the 27th of August, 1863.

Shortly after this the Watsons became bankrupts.

The appellants appealed from the final judgment of the High Court, contending, on the facts and evidence, that the judgment of the Court of the 24 Pergunnahs was right, and that the judgment pronounced by the High Court of Judicature was wrong.

The *Solicitor-General* (Sir. G. Jessel, Q.C.), Mr. Lindley, Q.C., and Mr. F. M. White, for the Appellant:

This is a question of partnership, which must be decided by the true construction of the deed of agreement between the late Rajah Pertab Chunder Sing and the Messrs. Watson, of the 27th of August, 1863. The relative position of the parties before that agreement might be, and probably was, only that of debtor and creditor. It appears from the evidence, that the Rajah had advanced, from time to time, very large sums to the Watsons' firm to enable them to carry on their business, but there was no written agreement between the parties, and no partnership is alleged to have existed prior to the agreement of the 27th of August, 1863. By that agreement, in consideration of the sums already advanced, and to be advanced, by the rajah, the Messrs. Watson bound themselves to make no shipments without the consent of the rajah, to hold the shipping documents, and the proceeds of the shipments, at the disposal of the rajah, not to obtain remittances from home in the shape of goods without his consent, or consignment of goods from 426] home, and to make over to the rajah, or hold *under his control, all remittances received from home, whether in money or goods. Such remittances and their proceeds were to be held wholly at the disposal of the rajah for the purpose of ex-

tinguishing the debt due by the Watsons to him; and even the proceeds of the sale of goods consigned free to the firm were not to be remitted to the consignees without the consent of the rajah. The Watsons, moreover, bound themselves to consult the rajah in all the details of the business, to regulate their establishment by his directions, to draw no money from the firm for any purpose without his consent, and to allow him free access to all the books and papers of the firm. The Messrs. Watson further agreed, that the rajah should, in consideration of the advances made, liability incurred, and future advances which might be made, receive a commission of 20 per cent. on all net profits made by the firm, from time to time, commencing from the 1st of May, 1862, until such time as the whole of the debts due to him should be paid off, and the liability already incurred by him should be wholly extinguished; and the Watsons agreed not to alienate certain plantations owned by them, the title deeds of which they made over to the rajah as security, and gave him a lien on all their property, with a covenant to pay him 12 per cent. interest on all sums advanced. Now, it is in evidence, that the sum of Rs. 27,458 was, under this agreement, written over on the 30th of September, 1863, to the credit of the rajah in the books of the firm, as his commission on the net profits up to the end of April in that year. After the date of this agreement he advanced further sums of money to the firm; and though it does not appear that he availed himself very largely of the powers conferred on him by the agreement, yet he attended at the house of business from time to time, and interested himself generally in the concern, consulting with his partners, the Watsons, and, if present, taking part in the business of the firm. It is also in evidence that the Watsons considered and treated him as their partner, and he is not proved to have done anything himself to disown or disprove that connection. Now, all these circumstances, coupled with the conditions and interests contained in the agreement, constituted, as we maintain, and as was held by the judge of the 24 Pergunnahs, a valid and subsisting partnership, and rendered the rajah liable as a partner from the date of the agreement, or, at least, as regards [427 third parties to be treated as the Watsons' partner. The act to amend the Law of Partnership (28 & 29 Vict. c. 86) did, of course, not exist at the time of these transactions, nor if it had existed would it have applied to India, but it shows, when it declares by the 1st section, that a lender is not to be considered a partner, by advancing money for a share of profits, what the law was anterior to that enactment, and, we contend, it is now, as regards the circumstances of this case: Act, No. XV. of 1866.

Blacum ⁽¹⁾, which was relied on in the High Court, is in doubt, be relied on by the respondent here, and not in point. There some of the creditors were on the business as trustees under the deed for the benefit of the others; and it was held that the respondent was not partners under the deed. So where there is no right to interfere as in the case of the executors of a deceased partner, such executors are no partners: *Holme v. Lush* ⁽²⁾; or of inspectors carrying on the trade of the deceased under deed without share of profits or control of the business: *Redpath v. Wigg* ⁽³⁾; *Easterbrook v. Barker* ⁽⁴⁾. In *Watson v. Jukes* ⁽⁵⁾, where the agreement was that a party was to be repaid a debt out of the profits, if any, of the business, the surplus to belong to other parties, there was considerable difference of opinion among the judges as to the effect of the decision in *Cox v. Hickman*. An agreement for a man to have a share in the profits of the business till a debt is paid makes him a partner: *Bond v. Pittard* ⁽⁶⁾; *Barry v. Nesham* ⁽⁷⁾; *Blacum v. Pell* ⁽⁸⁾. Any specific participation in the profits creates a partnership: *Ex parte Hamper* ⁽⁹⁾; *The English and Irish Church Ins. Soc.* ⁽¹⁰⁾; *Shaw v. Gall* ⁽¹¹⁾; *Bullen v. Sharp* ⁽¹²⁾; *Waters v. Taylor* ⁽¹³⁾; *Ex parte Langdale* ⁽¹⁴⁾. We maintain, therefore, that the rajah was a partner in the firm of Watson & Co., and was therefore bound by the acts of his co-partners in the usual course of business: and that, whether he was partner or not, the Watsons, as his agents, were authorized to pledge his credit; that he became jointly liable with them to the appellants, and that the judgment of the judge of the Court of the 24 Pergunnahs was right and ought to be sustained.

Sir R. Palmer, Q.C., Mr. H. James, Q.C., and Mr. Doyme, for the Respondent:

There are no grounds for fixing the rajah with liability as a partner for the debts of the firm of Watson & Co., or any part of them. The agreement of the 27th of August, 1863, was entered into by Watson & Co., as debtors, with the rajah, as their creditor, and in no other character; and its stipulations constitute only the terms of an arrangement between the rajah, as such creditor, and the firm as his debtors, as to the means by

⁽¹⁾ 8 H. L. C., 268.

⁽²⁾ Law Rep. 7 Ex., 218.

⁽³⁾ Law Rep. 1 Ex., 335.

⁽⁴⁾ Law Rep. 6 C. P., 1.

⁽⁵⁾ 3 B. & S., 847; 22 L. J. (Q.B.), 217.

⁽⁶⁾ 3 M. & W., 357.

⁽⁷⁾ 3 C. B., 641.

⁽⁸⁾ Cited in *Grace v. Smith*, 2 W. Bl., 999.

⁽⁹⁾ 17 Ves., 403.

⁽¹⁰⁾ 1 Hem. & Mil., 85.

⁽¹¹⁾ 16 Ir. C. L. Rep., 357.

⁽¹²⁾ Law Rep. 1 C. P., 86.

⁽¹³⁾ Tudor's L. C. on Mer. & Mar. Law [2nd Ed.], 347.

⁽¹⁴⁾ 18 Ves., 800.

which payment of his debt should be provided for and secured. The provision for payment to the rajah of a commission of 20 per cent., upon the net profits made or to be made by the firm before the debt should be fully discharged, was not a contract for his participation in the profits of the business, nor a contract authorizing Watson & Co. to carry on the business for the joint benefit, or on the joint account, of the rajah and themselves, but was, in effect, nothing more than a stipulation for an addition contingent upon, and proportionate to, any profits which might be realized by Watson & Co. to the ordinary rate of interest upon the rajah's debt, such being a lawful stipulation as between debtor and creditor, and in no wise operating to make the creditor a partner in the debtor's business. This is the true and legal effect of the agreement between the parties, and it is preposterous to seek, as the appellants have done, to make the rajah liable under it for the entire claims of the appellants upon Watson & Co. for private and partnership debts, from the commencement of their mutual dealings to the end of the year 1864. The law applicable to the case has been entirely misconceived by the judge of the Court of the 21 Pergunnahs, but has been rightly applied by the High Court. The case must be governed by the decision of the House of Lords in *Cox v. Hickman* (1); there Smith & Co., trading in that name, becoming embarrassed, executed a deed, to which they were parties of the *first part; certain of the creditors, as trustees, of the [429 second part; and the general scheduled creditors (among whom the trustees were named), of the third part. The deed assigned the property of S. & S. to the trustees, and empowered them to carry on the business under the name of the "Stanton Iron Company," to execute all contracts and instruments necessary to carry it on, to divide the net income to be taken among the creditors in rateable proportions (such income to be deemed the property of S. & S.), with power to the majority of the creditors, assembled at a meeting, to make rules for conducting the business or to put an end to it altogether; and after the debts had been discharged, the property was to be retransferred by the trustees to S. & S. Two of the creditors, C. and W., were named among the trustees. C. never acted. W. acted for six weeks and then resigned. Some time afterwards the other trustee, who continued to carry on the business, became indebted to H., and gave him bills of exchange accepted by themselves "*Per proc.* the Stanton Iron Company." It was held, that there was no partnership created by the deed, and that consequently C. and W. could not be sued on the bills as partners in the company. Now, the effect of this decision was

(1) 8 H. L. C., 268.

to overrule the conclusion that had before prevailed, that because a man was interested in the profits of a partnership, therefore, he was a partner, and to hold that participation in the profits did not of itself constitute a partnership; that it was indeed right, in deciding, whether or no a man was a partner, to consider, whether or no he was interested in the profits; and their lordships evidently attributed very great weight to that circumstance. But they emphatically put the question upon a wider ground; and the question now is, not did the person sought to be made liable participate in the profits, but has the trade been carried on by persons acting on his behalf? The case of *Cox v. Hickman* has been followed and adopted in principle by the Exchequer Chamber in the case of *Bullen v. Sharp* ⁽¹⁾ from the Common Pleas, where a memorandum of agreement giving a contingent interest in the net average profits of the business of an underwriter, was held not to constitute a partnership. That case overruled the *dictum* in *Grace v. Smith* ⁽²⁾, and the judgment in *Waugh v. Curver* ⁽³⁾, and upheld the decision 430] *of the House of Lords, in *Cox v. Hickman* ⁽⁴⁾ which must now be taken to be the only authority on the subject: *Stocker v. Brockelbank* ⁽⁵⁾, Tudor's L. C. on Mer. & Mar. Law, 343. Story on Partnership, ch. iv., sect. 49 [6th Ed.]; Lindley on Partnership [2d Ed.], pp. 38-9. •

The consideration of their lordships' judgment having been reserved was now delivered by

SIR MONTAGUE SMITH :

The action which gives occasion to this appeal was brought by the plaintiffs (the appellants) merchants of London, against the late Rajah Pertab Chunder Sing, to recover a balance of nearly three lacs of rupees claimed to be due to them from the firm of W. N. Watson & Co., of Calcutta.

The rajah having died during the pendency of the suit, the defence was continued by the respondent, the Court of Wards, on behalf of his minor heir.

The plaint alleged that the firm of W. N. Watson & Co., consisted of William Noel Watson, Thomas Ogilvie Watson, and the rajah, and sought to make the rajah liable as a partner in it.

It may be assumed, although the exact amount is a question in dispute in the appeal, that a large balance became due from the firm to the plaintiffs during the time when it is contended that the rajah was in partnership with two Watsons.

The questions in the appeal depend, in the main, on the

⁽¹⁾ Law Rep. 1 C. P., 109.

⁽²⁾ 2 H. Bl., 235.

⁽³⁾ 2 W. Bl., 998.

⁽⁴⁾ 8 H. L., Cases, 268.

⁽⁵⁾ 3 Mac. & G., 263.

construction and effect of a written agreement entered into between the Watsons and the rajah; but it will be necessary to advert to some extrinsic facts to explain the circumstances under which it was made and acted on.

The two Watsons commenced business in partnership, as merchants at Calcutta, in 1862, under the firm of W. N. Watson & Co. Their transactions consisted principally in making consignments of goods to merchants in England, and receiving consignments from them.

In January, 1863, they entered into an agreement with the plaintiffs regulating the terms on which consignments were to be made between them, and under which W. N. Watson [431] & Co., were authorized, within certain limits, to draw on the plaintiffs in London against consignments.

The Watsons had little or no capital. The rajah supported them, and in 1862 and 1863 he made large advances to enable them to carry on their business, partly in cash, but chiefly by accepting bills, for which the Watsons obtained discount, and which the rajah met at maturity. In the middle of 1863 the total amount of these advances was considerable, and the rajah desired to have security for his debt, and for any future advances he might make, and also wished to obtain some control over the business by which he might check what he considered to be the excessive trading of the Watsons.

Accordingly, an agreement was entered into on the 27th of August, 1863, between the rajah of the one part, and "Messrs. W. N. Watson & Co.," of the other part, by which, in consideration of money already advanced, and which might be thereafter advanced by the rajah to them, the Watsons agreed to carry on their business subject to the control of the rajah in several important particulars, which will be hereafter adverted to. They further agreed to, and in fact did, hand over to him "as security" the title deeds of certain tea plantations, and they also agreed, that "as further security" all their other property, landed or otherwise, including their stock in trade, should be answerable for the debt due to him.

The 10th and 13th clauses of the agreement were as follows : [His lordship read these clauses, *ante*, p. 422.]

This agreement is not signed by the rajah, but he was undoubtedly an assenting party to it.

Subsequently to the agreement, the rajah made further advances, and the amount due to him ultimately exceeded three lacs of rupees.

In 1864 and 1865, the firm of W. N. Watson & Co., fell into difficulties. An arrangement was then made, under which the rajah, upon the Watsons executing to him a formal mortgage

of the tea plantations, to secure the amount of his advances, released to them, by a deed bearing date the 3d of March, 1865, all right to commission and interest under the agreement of August, 1863, and all other claims against them.

432] *In point of fact, the rajah up to this time had never received possession of any of the property or moneys of the firm, nor any of the proceeds of the business, and did not in fact receive any commission. A sum of Rs.27,000 on this account was, indeed, on the 30th of September, 1863, placed to his credit in the books of the firm in a separate account opened in his name, but the sum so credited was never paid to him, and was subsequently "written back" by the Watsons.

Some evidence was given as to the extent of the interference of the rajah in the control of the business. It seems the rajah knew little of its details, and it is unnecessary to go, with any minuteness, into the facts on this part of the case; for it was conceded that the rajah availed himself only in a slight degree of the powers of control conferred upon him by the agreement: in fact, that he did not more, but much less, than he might have done under it, so that the question really turns on the effect of the contract itself. The subsequent acts of the rajah do not in any way add to or enlarge his liability.

Before proceeding to the main questions which have been argued in the appeal, it may be as well to clear the way for their consideration by saying that no liability can in this case be fastened upon the rajah on the ground that he was an ostensible partner, and, therefore, liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out; and that a statement made by one of the Watsons to the plaintiffs, to the effect that he might be in law a partner, by reason of his right to commission on profits, was not authorized by the rajah.

The liability, therefore, of the rajah for the debts contracted by W. N. Watson & Co. must depend on his real relation to that firm under the agreement.

It was contended, for the appellants, that he was so liable:

First, because he became by the agreement, at least as regards third persons, a partner with the Watsons; and

Secondly, because, if not "a true partner" (the phrase used by Mr. Lindley in his argument), the Watsons were the agents of the rajah in carrying on the business; and the debt to the plaintiffs was contracted within the scope of their agency.

The case has been argued in the courts of India and at their 433] *lordships' bar, on the basis that the law of England relating to partnerships should govern the decision of it. Their lordships agree that, in the absence of any law or well

established custom existing in India on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the courts in that country to a right decision. But whilst this is so, it should be observed that in applying them, the usages of trade and habits of business of the people of India, so far as they may be peculiar, and differ from those in England, ought to be borne in mind.

The agreement, on the face of it, is an arrangement between the rajah, as creditor, and the firm consisting of the two Watsons, as debtors, by which the rajah obtained security for his past advances; and in consideration of forbearance, and as an inducement to him to support the Watsons by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the rajah as a creditor of the firm.

It was contended at the bar, that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances.

It appears to their lordships that the rule of construction involved in this contention is too artificial; for it takes one term only of the contract and at once raises a presumption upon it. Whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons. (See this pointedly stated by Mr. Justice Blackburn, in *Bullen v. Sharp* ⁽¹⁾.) The rule had been laid down with distinctness by Eyre, C. J., in *Waugh v. Carver* ⁽²⁾, and the reason of the rule the chief justice thus states: "Upon the principle [434] that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of *Grace v. Smith* ⁽³⁾, and we think it stands upon fair grounds of reason."

The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was estab-

⁽¹⁾ Law Rep., 1 C. P., 109.

⁽²⁾ 2 H. Bl., 235.

⁽³⁾ 2 W. Bl., 998.

lished between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the words of Lord Eldon) "to a given quantum of the profits."

The distinction was stated to be "clearly settled" and was acted upon by Lord Eldon in *Ex parte Hamper* ⁽¹⁾, and in other cases. It was also affirmed and acted on in *Pott v. Eyton* ⁽²⁾, where Tindal, C.J., in giving the judgment of the court, adopts the rule as laid down by Lord Eldon, and says, "Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales ⁽³⁾."

The present case appears to fall within this distinction. The rajah was not entitled to a share of the profits "as such;" he had no specific property or interest in them *quâ* profits, for, subject to the powers given to the rajah by way of security, the Watsons might have appropriated or assigned the whole profits without any breach of the agreement. The rajah was entitled only to commission, or a payment equal in proportion to one-fifth of their amount.

This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened since the presumption itself lost the rigid 435] character *it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in *Cox v. Hickman* ⁽⁴⁾ and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that *Waugh v. Carver* ⁽⁵⁾, and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox v. Hickman* had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that although a right to participate in the profits of

⁽¹⁾ 17 Ves., 412.

⁽²⁾ 8 C. B., 32.

⁽³⁾ *Ibid.*, 40.

⁽⁴⁾ 8 H. L. C., 268.

⁽⁵⁾ 2 H. Bl., 285.

trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible partner can be held liable to a creditor of the firm. The reason given in *Grace v. Smith*, that by taking part of the profits he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner.

Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel.

Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

Numerous definitions by text-writers of what constitutes a partnership are collected at the end of the introduction to Mr. Lindley's *excellent treatise on this subject. Their lord- [436 ships do not think it necessary to refer particularly to any of them, or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say, that to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common.

It was strongly urged, that the large powers of control, and the provisions for empowering the rajah to take possession of the consignments and their proceeds, in addition to the commission on net profits, amounted to an agreement of this kind and that the rajah was constituted, in fact, the managing partner.

The contract undoubtedly confers on the rajah large powers of control. Whilst his advances remained unpaid, the Watsons bound themselves not to make shipments, or order consignments, or sell goods, without his consent. No money was to be drawn from the firm without his sanction, and he was to be consulted with regard to the office business of the firm, and he might direct a reduction or enlargement of the establishment. It was also agreed that the shipping documents should be at his disposal, and should not be sold or hypothecated, or the proceeds

applied, without his consent; and that all the proceeds of the business should be handed to him, for the purpose of extinguishing his debt.

On the other hand, the rajah had no initiative power; he could not direct what shipments should be made or consignments ordered, or what should be the course of trade. He could not require the Watsons to continue to trade, or even to remain in partnership; his powers, however large, were powers of control only. No doubt he might have laid his hands on the proceeds of the business; and not only so, but it was agreed that all their property, landed and otherwise, should be answerable to him as security for his debt.

Their lordships are of opinion, that by these arrangements the parties did not intend to create a partnership, and that their true relation to each other under the agreement was that of creditor and debtors. The Watsons evidently wished to induce the rajah to continue his advances, and for that purpose were willing to give him the largest security they could offer; but a partnership was not contemplated, and the agreement is really [437] founded on the *assumption, not of community of benefit, but of opposition of interests.

It may well be, that where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to show that any other was contemplated; but that is not the present case, where another and different contract is shown to have been intended, viz., one of loan and security.

Some reliance was placed on the statute, 28 & 29 Vict. c. 86, sect. 1, which enacts, that the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a partner, or render him responsible as such. It was argued, that this raised an implication that the lender was so responsible by the law existing before the passing of the act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shown to be different from that which the legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence. What may be the effect of the positive enactment contained in the 5th clause of the act, so far as regards England, it is not necessary for their lordships to consider. The Indian Act, No. XV. of 1866, passed after this contract was made, does not contain that provision.

It was strongly insisted for the appellants that if "a true partnership" had not been created under the agreement, the

Watsons were constituted by it the agents of the rajah to carry on the business, and that the debt of the plaintiffs was contracted within the scope of their agency.

Of course, if there was no partnership, the implied agency which flows from that relation cannot arise, and the relation of principal and agents must on some other ground be shown to exist. It is clear that this relation was not expressly created, and was not intended to be created by the agreement, and that if it exists it must arise by implication. It is said that it ought to be implied from the fact of the commission on profits, and the powers of control given to the rajah. But this is again an attempt to create, by operation of law, a relation opposed to the real agreement *and intention of the parties, exactly in [438 the same manner as that of partners was sought to be established, and on the same facts and presumptions. Their lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the Watsons and the rajah so as to create a partnership; and they think there is no sufficient ground for holding that it was carried on for the rajah, as principal, in any other character. He was not, in any sense, the owner of the business, and had no power to deal with it as owner. None of the ordinary attributes of principal belonged to him. The Watsons were to carry on the business; he could neither direct them to make contracts, nor to deal with particular customers, nor to trade in the manner which he might desire: his powers were confined to those of control and security, and subject to those powers, the Watsons remained owners of the business and of the common property of the firm. The agreement in terms, and, as their lordships think, in substance, is founded on the relation of creditor and debtors, and establishes no other.

Their lordships' opinion in this case is founded on their belief that the contract is really and in substance what it professes to be, viz., one of loan and security between debtors and their creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

For the above reasons their lordships think that the judges of the High Court, in holding that the rajah was not liable for the debts of the firm of W. N. Watson & Co., took a correct view of the case; and they will, therefore, humbly advise Her

was present when business was transacted, and took part in it.

It appeared that the Watsons held out the rajah to be a partner to the plaintiffs and others. It also appeared that the rajah, subsequently to the entry to his credit of the above sum 425] of *Rs.27,458. 14a. 4½p., drew against the sum; but it appeared further, that afterwards, in March or April, 1864, this sum was written over to his debit in the books of the firm.

In the years 1864 and 1865, the firm of the Watsons fell into great difficulties, and were, in fact, insolvent. In March, 1865, the rajah executed a deed wherein, *inter alia*, the agreement of the 27th of August, 1863, was recited, and whereby he released and relinquished all claim under the agreement of the 27th of August, 1863, to "the said commission or profits," and all claims to any other moneys, except a sum which was stated in the deed, and which was, by an indenture of even date, secured by a mortgage of the tea plantations at Cachon, under the agreement of the 27th of August, 1863.

Shortly after this the Watsons became bankrupts.

The appellants appealed from the final judgment of the High Court, contending, on the facts and evidence, that the judgment of the Court of the 24 Pergunnahs was right, and that the judgment pronounced by the High Court of Judicature was wrong.

The *Solicitor-General* (Sir. G. Jessel, Q.C.), Mr. *Lindley*, Q.C., and Mr. *F. M. White*, for the Appellant:

This is a question of partnership, which must be decided by the true construction of the deed of agreement between the late Rajah Pertab Chunder Sing and the Messrs. Watson, of the 27th of August, 1863. The relative position of the parties before that agreement might be, and probably was, only that of debtor and creditor. It appears from the evidence, that the Rajah had advanced, from time to time, very large sums to the Watsons' firm to enable them to carry on their business, but there was no written agreement between the parties, and no partnership is alleged to have existed prior to the agreement of the 27th of August, 1863. By that agreement, in consideration of the sums already advanced, and to be advanced, by the rajah, the Messrs. Watson bound themselves to make no shipments without the consent of the rajah, to hold the shipping documents, and the proceeds of the shipments, at the disposal of the rajah, not to obtain remittances from home in the shape of goods without his consent, or consignment of goods from 426] home, and to make over to the rajah, or hold *under his control, all remittances received from home, whether in money or goods. Such remittances and their proceeds were to be held wholly at the disposal of the rajah for the purpose of ex-

tinguishing the debt due by the Watsons to him; and even the proceeds of the sale of goods consigned free to the firm were not to be remitted to the consignees without the consent of the rajah. The Watsons, moreover, bound themselves to consult the rajah in all the details of the business, to regulate their establishment by his directions, to draw no money from the firm for any purpose without his consent, and to allow him free access to all the books and papers of the firm. The Messrs. Watson further agreed, that the rajah should, in consideration of the advances made, liability incurred, and future advances which might be made, receive a commission of 20 per cent. on all net profits made by the firm, from time to time, commencing from the 1st of May, 1862, until such time as the whole of the debts due to him should be paid off, and the liability already incurred by him should be wholly extinguished; and the Watsons agreed not to alienate certain plantations owned by them, the title deeds of which they made over to the rajah as security, and gave him a lien on all their property, with a covenant to pay him 12 per cent. interest on all sums advanced. Now, it is in evidence, that the sum of Rs.27,458 was, under this agreement, written over on the 30th of September, 1863, to the credit of the rajah in the books of the firm, as his commission on the net profits up to the end of April in that year. After the date of this agreement he advanced further sums of money to the firm; and though it does not appear that he availed himself very largely of the powers conferred on him by the agreement, yet he attended at the house of business from time to time, and interested himself generally in the concern, consulting with his partners, the Watsons, and, if present, taking part in the business of the firm. It is also in evidence that the Watsons considered and treated him as their partner, and he is not proved to have done anything himself to disown or disprove that connection. Now, all these circumstances, coupled with the conditions and interests contained in the agreement, constituted, as we maintain, and as was held by the judge of the 24 Pergunnahs, a valid and subsisting partnership, and rendered the rajah liable as a partner from the date of the agreement, or, at least, as regards [427] third parties to be treated as the Watsons' partner. The act to amend the Law of Partnership (28 & 29 Vict. c. 86) did, of course, not exist at the time of these transactions, nor if it had existed would it have applied to India, but it shows, when it declares by the 1st section, that a lender is not to be considered a partner, by advancing money for a share of profits, what the law was anterior to that enactment, and, we contend, it is now, as regards the circumstances of this case: Act, No. XV. of 1866.

“ And for an answer to so much of the petition as is contained in the 7th, 8th, and 9th paragraphs of the said petition, the defendant says, that previous to and at the time of the said representations complained of, the plaintiff and the defendant were both in the employ of the Chinese government, and it was the defendant's duty, in pursuance of such employment, at various times, and from time to time, to report to the tsung-li-yamên, or foreign board, at Peking, upon the conduct of, and representations and movements of, the professors attached to the Tung-wên-Kwan, and upon those of the plaintiff amongst others; and the defendant, in the ordinary course, and in the lawful exercise of his duty, and because it became necessary and incumbent upon him by his duty to the said Chinese government, in pursuance of such employment as aforesaid, to do so, and as an act of duty and not otherwise, made certain reports of and concerning the conduct, movements, and representations of the plaintiff, which are the wilfull and false representations complained of in the said petition.”

“ And for a further answer to the whole of the said petition, the defendant says — That in so far as it relates to any representations made and acts done, having reference to the said Tung-wên-Kwan, he was previous to, and both he and the plaintiff were during the whole of the time in the said petition referred to, in the employ of the Chinese government, and in such employment it became and was his, the defendant's, duty to superintend all the affairs connected with the Tung-wên-Kwan, and 442] the foreigners connected *therewith, and to make such representations, write such letters, do such acts, and pay such sums of money, as to the said defendant in his discretion should seem fit in the premises, and that any and every of the representations made, letters written, acts done, or sums of money held by the defendant, or withheld from the plaintiff by the defendant, or by the defendant's order, as alleged in the said petition, were so made, written, done, held, or withheld respectively by the defendant in the exercise of his lawful authority, in pursuance of such employment, and in the exercise of his said duty as a servant to the said imperial Chinese government, and in pursuance of no other object, and in virtue of his said position, and in virtue of no other.”

The respondent moved for, and obtained leave to demur to the paragraphs above set forth.

The demurrer came on to be argued on the 29th of March, 1870, when judgment was given for the respondent, and it was ordered that those paragraphs (amongst others) should be struck out as furnishing no answer in law.

The answer of the appellant was accordingly amended pursuant to this order.

The action came on for trial on the 13th of April, 1870, before C. W. Goodwin, Esq., assistant judge of the Supreme Court for China and Japan, and a jury.

The facts of the case were, in substance, as follows;

The appellant, who was formerly in the employ of the British consular service in China, had accepted, some years ago, from the Chinese government, the appointment of inspector general of customs. Amongst other duties he had to look after the foreign department of the Tung-wên-Kwan, an institution established at Peking for the purpose of teaching the Chinese western languages and sciences. The appellant left China for Europe in 1866, and before leaving had a conversation with the ministers of the tsung-li-yamên, or foreign board, about extending the Tung-wên-Kwan, and received instructions to find professors, and appoint their salaries and duties. The appellant, whilst in England, and in the summer of 1866, appointed Mr. J. D. Campbell to be chief secretary to the inspector general of customs, and about the same time was introduced by Mr. Campbell to the respondent, *who had written certain works on sub- [443] jects connected with mathematics and astronomy. The appellant subsequently appointed the respondent to the chair of mathematics and astronomy in the Tung-wen-Kwan, at a salary of £600 per annum. The appellant stated, that at an interview with the respondent, prior to thus appointing him, he told him what the character of the college was, and what the professors would have to do, adding that it was now in its infancy, but that in the course of time, after years, it would grow to the equivalent of the universities in Europe. According to the statement of the respondent, the appellant and Mr. Campbell, on his behalf, made certain other representations to him, which induced him to accept the appointment and to go out to China, and which were the fraudulent representations complained of in the petition. The appellant and Mr. Campbell, however, both denied that any such representations were made. The respondent left England in pursuance of his appointment, and arrived at Peking in November, 1866. At the time of his arrival none of the students were prepared to receive mathematical instruction in the English language, but the respondent was in the meantime to occupy himself in the study of Chinese. In the year 1867, the respondent became discontented with his position, and anxious to be relieved altogether of the duty of teaching mathematics, and to be director of the observatory only. He, as he alleged, was informed by the appellant, in February of that year, that he was made director of the ob-

servatory; and was relieved of the chair of mathematics, to which another person was appointed. No other person was, however, appointed professor of mathematics during the whole time that the respondent continued to be a professor of the college.

It appeared that in May, 1868, the appellant informed the respondent that he could not relieve him from his mathematical duties, and that he ought to study Chinese to fit himself to perform them. The respondent, however, protested against being called on to teach mathematics, saying it was an indignity to a man of his position, and that he positively refused to do so. The appellant thereupon told him that it was necessary to come to an understanding, and that if he would not remain and teach mathematics the utmost he could do for him was to give him a year's pay and his passage home.

In the following June the respondent informed the appellant 414] *that he had made up his mind to go away, but asked to be allowed to remain till the end of the summer. To this the appellant did not object; and when the respondent left at the end of the interview, it was on the understanding that he was giving up his position, that he was to receive his allowance to the end of the quarter, and that he was then to have a year's pay and his passage home.

The respondent, by his evidence, denied that any such understanding was come to, but about the time that it, according to the appellant's evidence, took place, the respondent made preparations for leaving, selling his furniture, and a number of his books.

It appeared, however, that in October, 1868, the appellant instructed his secretary, Mr. Wieters, to write and inquire in what way the respondent wished his money to be paid; that Mr. Wieters accordingly, on the 6th of October, 1868, wrote in German to make this inquiry. On receipt of an answer from the respondent, pay to the end of the September quarter, and the one year's pay promised on his retirement, was sent to the respondent, and its receipt acknowledged by him on the 8th of October, 1868. After receiving this money, the respondent wrote to the appellant a letter, dated the 11th of October, to inquire if the year's pay was an annual addition to his salary.

The appellant, in answer, wrote a letter, wherein, after recapitulating the terms of the arrangement made, he stated that the year's pay was the allowance promised on the termination of the respondent's connection with the college, and that the commissioners of customs would provide him a passage home.

The respondent, in reply notified that he could not accept the propositions and statements in the letter, as they were unwar-

ranted and at variance with the facts; but he did not return the sum sent to him, as explained by the above letter of the appellant, as the year's pay allowed on his retirement.

No further communication was received from the respondent until about a year afterwards, namely, on the 11th of October, 1869, when he wrote to the appellant, asking for from 1,200 to 1,500 taels on account of salary due, and suggesting that the differences pending as to salary and other matters should be referred to arbitration. The appellant, in reply, inquired what the questions were which the respondent desired to be submitted to arbitration, and *having received the respondent's answer, the appellant explained at length his reasons for declining to agree to an arbitration. [445]

In September, 1869, the appellant wrote to the tsung-li-yamên reporting the respondent's resignation of his post as professor of the Tung-wên-Kwan, having previously mentioned it to members of the board by word of mouth.

The appellant having, however, learned from Dr. Martin, who was at that time president of the Tung-wên-Kwan, that the respondent did not desire to be regarded as having resigned, and considered that he had not done so, wrote a despatch to the tsung-li-yamên on the 22d of November, 1869, withdrawing his despatch about the respondent's resignation.

On the 27th of November, 1869, the respondent wrote to the appellant, stating that the appellant's refusal to settle the differences pending by arbitration or amicable arrangement, imposed on him the necessity of submitting them to a legal decision. He stated further that he intended, with that view, proceeding to Shanghai on the next day, and requested the appellant to acquaint the imperial government with the occasion for and object of his temporary absence from the capital.

The appellant reported to the tsung-li-yamên accordingly, and received from the tsung-li-yamên a despatch stating that in view of the action taken by the respondent it was not fitting that he should be any longer retained as a professor in the college, and desiring the appellant to intimate the same to the respondent, which the appellant did, by a letter, dated the 30th of November, 1869.

It was determined on behalf of the government to pay the respondent his salary down to the 30th of November, 1869, the date of the above letter, and a check for 176 taels, the balance of such salary, was tendered to the respondent, but he refused to sign the receipt required of him in exchange on behalf of the Chinese government, and the check was therefore, not handed to him. The appellant never received this sum; it remained in the Chinese government funds, payable to the respondent's or-

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446] der.¹ *The action was tried on the 13th of April, 1870, and two following days before Mr. Charles Goodwin, assistant judge of the Supreme Court, and a jury.

The appellant's counsel contended at the trial that the reports made by the appellant to the tsung-li-yamên were privileged, and that there was no evidence to go to the jury in support of the respondent's case. The learned judge ruled that there was evidence to go to the jury on all the claims of the respondent, except that on the money counts there was evidence only as to 176 taels. The summing up of the learned judge, with reference to the questions upon which the verdict was found for the respondent, was as follows: "The second issue was—whether Mr. Hart, by misrepresenting that the baron (the plaintiff) was absent from Peking when he was wanted, made a false statement? and did the Chinese government dismiss him in consequence? It was a thing specially for the jury to consider, whether the representations were warranted by facts. Then supposing they found that injury had been done plaintiff, the question again arose—What was the amount of damage? The plaintiff was in receipt of a present income, to which there appeared a possibility of increase at the end of five years, so that there was a possible loss if they found that he had been unjustly deprived of his post. He did not for a moment mean to say, that this salary must be taken as an absolute measure of damages. This was not a case of contract. It was that of a man who was alleged to have been put out of something which he had, in consequence of a false representation. He might get his living elsewhere. He might get out of China, and get rid of the risk to life there. They must take all this into consideration if they thought he had been unjustly deprived of his appointment. In regard to the 176 taels, he believed he must tell them that they would have to return a verdict for that sum."

The jury returned a verdict for the appellant upon that part of the petition relating to the alleged fraudulent representations of the respondent. On the second part, relating to the alleged wilfull and false representations to the tsung-li-yamên, they found for the respondent (the then plaintiff), and assessed the damages at £1,800 on the account stated; they also found for the respondent for the 176 taels.

447] *On the 20th of April, 1870, a rule *nisi* on the ground of misdirection—the judge not having left to the jury, first, whether the representations were privileged, and secondly,

(¹) The letters forming the correspondence between the appellant and respondent, and those sent by the appellant to the tsung-li-yamên regarding

the respondent's resignation of office, are fully stated and set out in their lordships' judgment, post, p. 458 to 457.

whether they were wilfully false, and thirdly, that there was no evidence to be left to the jury—was granted by the Supreme Court to set aside the verdict so found for the respondent.

The rule came on for argument on the 8d of May, 1870, before Sir Edmund Hornby, chief judge of the court, and C. W. Goodwin, Esq., assistant judge, when judgment was pronounced for the respondent, and it was ordered that the rule be discharged.

Against this judgment and order the appellant obtained leave to appeal, and also special leave to appeal from the prior order of the 29th of March, 1870.

Sir John Karlake, Q.C., and Mr. Herschell, Q.C., for the Appellant:

The first question is as to the jurisdiction of the Supreme Court in China. The complaint of the respondent against the appellant was in respect of acts done in China by the appellant, in his official character as functionary of the Chinese empire. Such acts were not within the cognizance of, and ought not to have been inquired into or adjudicated upon, by Her Majesty's Supreme Court for China and Japan. The Supreme Court for China and Japan was established by the orders in council of the 9th of March, 1865, issued pursuant to the provisions and powers contained in the 6 & 7 Vict. c. 80, and the 6 & 7 Vict. c. 94; and we admit has jurisdiction over all British subjects resident in China; but the question which arises here is, whether the queen had, under these acts, or in any other form, authority to constitute a court, with power to adjudicate as between British subjects for acts done by them in the service of and under the authority of the emperor of China. That is a far wider question, and must depend on the law of nations. The treaty of Tientsin of the 24th of October, 1860, which is the foundation of Her Majesty's jurisdiction in China, by Art. 15 provides that all questions arising between British subjects are to be subject to the jurisdiction of the court to be thereafter established, that was the Supreme Court; but no jurisdiction was given over such British subjects as the municipal courts in China would *have jurisdiction over. The cases of [448 *The Duke of Brunswick v. The King of Hanover* (1); and *Munden v. The Duke of Brunswick* (2); illustrate the doctrine we contend for. *The Secretary of State in Council of India v. Kamuchee Boye Sahab* (3); *The East India Company v. Syed Ally* (4); *Duke of Brunswick v. Harmer* (5); *Wadsworth v. Queen of Spain* (6); *De*

(1) 6 Beav., 1.

(2) 10 Q. B., 656.

(3) 13 Moore P. C. Cases, 22.

(4) 7 Moore's Ind. App. Cases, 555.

(5) 19 L. J. (Q.B.), 20.

(6) 17 Q. B., 171.

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Haber v. Queen of Portugal ⁽¹⁾; are all cases showing that where the municipal courts of a country have jurisdiction over the subjects resident in a foreign country, those courts are the proper tribunals to take cognizance of causes where one of the litigants is in the service of the foreign sovereign: Wheaton on International Law, Part II., ch. II., p. 285 [Ed. 1863]. That is our first objection, but assuming that the Supreme Court had jurisdiction to try a case such as this, where one of the parties was, though a British subject, in the service of a foreign sovereign; the question really is, whether there was any ground of action, whether the reports made by the appellant to the Chinese government, in his official capacity, with respect to the conduct of the respondent as a subordinate official of the same government, were not privileged communications, and whether such privilege ought not to have been held a good defence to the action brought in Her Majesty's Supreme Court in China. We maintain that these were privileged communications: *Dawkins v. Lord Paulet* ⁽²⁾; *Dawkins v. Lord Rokeby* ⁽³⁾. Then there was no evidence of express malice, and the judge, in his charge to the jury, ought to have told them so.

Moreover, the learned judge misdirected the jury in telling them that they would have to find for the respondent on the money claims for 176 taels, for there was no evidence to go to the jury in support of such a claim, and the verdict, so far as it found for the respondent, was against the weight of evidence, and the damages were excessive; we submit, therefore, that the appellant is entitled to have the judgments and orders of the 29th of March and the 3d of May, 1870, reversed.

449] *Mr. Benjamin, Q. C., and Mr. P. Myburgh, for the Respondent:

The respondent was entitled to the judgment and orders complained of. The Supreme Court had alone jurisdiction to try the case, for it was in that court only that the appellant was liable to the respondent for the wrongs he had committed against him. The Chinese government had not adopted the acts of the appellant as their servant, and, therefore, his correspondence with their officer was not an act of state, and was not privileged. It was idle for the appellant to say, that what he did was by order of the Chinese government, and that, therefore, he was not amenable to the laws in Her Majesty's Supreme Court for China and Japan. The order in council of the 9th of March, 1865, Arts. 4 and 5, confers ample jurisdiction on the Supreme Court, and declares, that the law of England is the law to be administered. There was no necessity for the jury to find malice. In the case of damage occasioned by a wrongful act, though such as the

(1) Ibid., 196.

(2) Law Rep., 5 Q. B., 94.

(3) 4 F. & F., 806.

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law deems an injury, malice is not a necessary ingredient to the maintenance of an action; *Rogers v. Rajendro Dutt and others* ⁽¹⁾; *Ferguson v. The Earl of Kinnoull* ⁽²⁾. But, if necessary to enlarge on this point, it was sufficiently averred in the petition and proved: *Buron v. Denman* ⁽³⁾; *Dobree v. Napier* ⁽⁴⁾. It was no such privileged communication as protected the defendant in *Dawkins v. Lord Paulet* ⁽⁵⁾. There was no misdirection to the jury: *Greene v. Bateman* ⁽⁶⁾; *Fray v. Blackburn* ⁽⁷⁾; *Taylor v. Hawkins* ⁽⁸⁾. The question of privilege cannot be carried to such an extent as is argued for here, to shield a man from the consequences arising from false representations. None of the cases cited support the appellant's contention.

The case stood over for consideration.

Their lordships now delivered judgment by

SIR MONTAGUE SMITH :

This is an appeal from judgments of Her Majesty's Supreme Court *for China and Japan, at Shanghai, established in [450 the dominions of the emperor of China by virtue of the treaty of Tientsin.

The appellant and respondent are English subjects in the service of the Chinese government. The former holds the office of inspector general of customs, one of his duties being to treat with foreigners on matters in which the imperial government is concerned, under the general direction of the tsung-li-yamên, a board of ministers for foreign affairs.

The Chinese government having determined to establish a college at Peking, for the purpose of teaching "western languages and sciences," the appellant was authorized by the tsung-li-yamên to engage professors, and was invested with the general superintendence of the college. Acting on this authority he came to England, and the respondent on his appointment accepted the office of professor of mathematics and astronomy in the college, at a salary of £600 a year.

The action which gives occasion to this appeal was brought by the respondent for alleged false representations made by the appellant to the tsung-li-yamên, respecting his conduct as professor, which led to his dismissal by that board.

The petition included a charge of alleged misrepresentation, made to induce the respondent to accept the professorship, which the jury disposed of in favor of the appellant. It also contained a money claim, which will be separately considered hereafter.

⁽¹⁾ 13 Moore's P. C. Cases, 209.

⁽²⁾ 9 C. & F., 321.

⁽³⁾ 2 Ex., 167.

⁽⁴⁾ 2 Bing. N. C., 781.

⁽⁵⁾ Law Rep. 5 Q. B., 94.

⁽⁶⁾ Law Rep. 5 H. L., 591.

⁽⁷⁾ 3 B. & S., 576.

⁽⁸⁾ 16 Q. B., 308.

In the answer of the appellant to the charge of false representation, he denied that he had wilfully and falsely made the alleged representations, and he asserted that the representations respecting the respondent were contained in a report made by him to the tsung-li-yamên, in the course of his duty as a servant to the imperial Chinese government.

The respondent demurred to the paragraphs of the answer which raised the defence of official privilege, and the court ordered the paragraphs to be struck out. This is one of the orders appealed from.

The other issues were tried before the assistant judge and a jury and a verdict found for the plaintiff (respondent) with large damages.

A rule *nisi* was afterwards obtained for a nonsuit or a new 451] trial *on the ground of misdirection, and that the verdict was against the evidence.

The misdirections complained of were; first, the judge not having directed the jury that the representations were privileged; second, not having left to the jury whether the representations were wilfully false; third, that there was no evidence to go to the jury that the representations were wilfully false. The last point appears in the rule as a ground of nonsuit; but it may be taken as an objection to the direction of the judge, because, if there was no evidence that the statements were wilfully false the judge ought to have directed a verdict for the defendant.

After argument the court discharged the rule, which is the second order appealed from.

It will be convenient first to advert to the facts, and the trial and the rule for a new trial, before considering the judgment on the demurrer.

The respondent, and the appellant, and Mr. Campbell, his secretary, were examined, and a long correspondence read upon the trial. It appeared that on the 15th of August, 1866, the respondent, who was then in England, received an official letter from the appellant to say, that he had been selected for appointment "to the chair of mathematics and astronomy at the Tung-wên-Kwan (college) at Peking. After his arrival at Peking, obstacles arose to the establishment of a class in astronomy, and to the erection of an observatory. The respondent was disappointed, and complained of the delay, and especially of the loss of the opportunities he expected for scientific observations. He evinced at the same time great disinclination to become a teacher of a class in mathematics. He continued to receive his salary, but no classes in mathematics or astronomy

were formed. Various suggestions were made to expedite the formation of these classes, and to employ the time of the respondent meanwhile, but they led to no result. In 1868 he went to the Hills, and was absent from Peking for some time. About June in that year he had interviews with the appellant and Mr. Campbell, in which he expressed his determination to return to England. This fact is beyond dispute, for it is admitted in the respondent's own evidence.

The appellant and Mr. Campbell state, that at these interviews *the respondent also declared that he would not teach [452 mathematics. The appellant says: "He protested against being called on to teach mathematics — it was an indignity to a man in his position to teach mathematics. He positively refused to do so." Mr. Campbell says: "In June, 1868, he was constantly complaining. He told me he was required to teach mathematics, and he could not, and would not." The respondent was not recalled to contradict these explicit statements. He no doubt said in his evidence in chief, "During the whole of the time I was not called upon to perform any duties, nor did I refuse to do any." This may be literally true, as classes were not actually formed. He adds: "Mr. Hart came to me and asked me whether I would take again the chair of mathematics. I expressed my astonishment, as I understood Mr. Jamieson was appointed. I said I preferred to keep to our agreement. Hart appeared satisfied." This evidence cannot be regarded as a satisfactory denial of the explicit statements that he had declared that he would not teach mathematics. It is to be observed that there is no proof of the appointment of Mr. Jamieson.

At one of these interviews discussions took place with reference to putting an end to the respondent's engagement, and the terms on which it should be done. According to the appellant's evidence it was arranged, that the respondent should give up his appointment at the end of the coming September quarter on receiving his salary for that quarter, and in addition an allowance of one year's salary and a free passage home. The respondent denies that such an arrangement was made, but the fact is beyond dispute that, early in the following month of October, the quarter's salary and a year's additional salary were received by him. Soon after this payment, he wrote to inquire whether the year's pay was "an annual addition" to his salary. Now, whatever misunderstanding may have existed upon the question of a final agreement to terminate his engagement having been come to, there could be none as to the grounds upon which the allowance of a year's pay had been made by the

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appellant, who at once replied to this inquiry by a letter of the 15th of October, 1868: "You now inquire if the year's pay is 'an annual addition' to your salary—it is not; it is simply the allowance I promised should be issued to you at the end of the 453] September quarter, on the *termination of your connection with the college." In the same letter he was told that the commissioner of customs had instructions to provide for him a free passage home. The respondent, in reply to this letter, protested against the propositions, and the truth of the statements contained in it; but he kept the money.

The respondent remained in China, but for a year there seems to have been no communication between the parties. On the 11th of October, 1869, however, he wrote to the appellant asking for 1,200 or 1,500 taels on account of his salary, and suggesting whether it would not be expedient "in the common interest, and more especially in that of the imperial government," to settle all differences by arbitration or otherwise. He was asked to state what the differences were, and he answered by giving a series of questions, so framed as to open his original engagement and all subsequent agreements, and to leave generally to an arbitrator what he was in justice and equity entitled to receive as compensation from the Chinese government. The appellant, in a long letter in reply, recapitulated the history of the respondent's relations with the imperial government, and in the end stated that the questions were not of a nature which, as the agent of the government, he would be justified in submitting to arbitration.

In the course of this renewed correspondence, the respondent expressed a strong desire to stay in China, and urged his claim "in the common interest of science at large, and of Chinese science in particular," and expressed a desire "to write the history of Chinese astronomy and mathematics." It appears also that about this time Mr. Martin, the head of the professors, made a communication to the appellant in his favor, which induced the appellant to recall the despatch he had sent to the tsung-li-yamên reporting the respondent's resignation; and on the 22d of November, 1869, he thus writes to Mr. Martin:

"Inspectorate General of Customs,
Peking, 22d November, 1869.

"Sir,
"Having reference to Mr. Von Gumpach, who claims to still hold an appointment in the Tung-wên-Kwan, I beg to inform you that I never had any desire to displace him, and as he himself does not desire to be regarded as having resigned, I have written officially to the yamên to withdraw my former despatch,

and to *state that Mr. Von Gumpach, with your appro- [454
bation, continues to retain his position,

"I am,

"Sir,

"Your obedient Servant,

"ROBERT HART,

"Inspector General.

"Rev. W. A. P. Martin, D.D.,

"President of the Tung-wên-Kwan, Peking."

On the same day the appellant sent the following despatch to the tsung-li-yamên :

"Peking, 22d November, 1869.

"It will be remembered that I addressed the yamên in my despatch of 22d September, 1869, with reference to Fang-Ken-pa (Von Gumpach) who was long since engaged by me in behalf of the yamên as a professor in the Tung-wên-Kwan (lit., Government School of Languages) explaining that, in consequence of my having refused his request to raise a raised terrace (observatory ?) and to purchase books, Fang-Ken-pa had afterwards steadily declined to do any of the work that was allotted to him. And I (therein) reported that he had said to me in June, 1868, that 'as there had been words to the effect that he might return to his country, why perhaps he had better resign and do so.' I now have to state that I am told by Tng-wei-liang (Mr. W. Martin), the head of the professors, that Fang-Ken-pa has not yet returned home, and further that he holds that my action above, in requesting of the yamên that his functions might cease (i.e., to accept his resignation), was without any agreement or consent on his part.

"Since, therefore, the professor in question declares that he has not resigned, I have to request that the yamên will lay aside my despatch about his functions ceasing.

"I must consult with the newly made head of the college as to the way in which this matter is to be settled.

"As in duty bound, I write this for the information of the yamên.

"A necessary despatch, &c."

This attempt to reinstate the respondent was frustrated by his *own hostile proceedings. On the 27th of November, the [455 respondent wrote to the appellant a letter, in which he says :

"Your refusal to settle the differences pending between us, either by fair arbitration or amicable arrangement, imposes on me the necessity of submitting them to a legal decision. With this view I intend proceeding to Shanghai to-morrow, and I,

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therefore, request that you will be pleased to inform the imperial government with both the occasion for, and the object of, my temporary absence from the capital."

He added that there could be no objection, as he was told in 1867 that students would not be ready to join the astronomical class for seven or eight years.

This letter was reported, as the respondent desired, to the sung-li-yamên, and the action taken by them upon it appears in the following despatch from that board to the appellant:

"The yamên to Mr. Hart, inspector general of customs.

"(No. 375.)

"November 29, 1869.

"On the 23d of November the yamên received a despatch from the inspector general, reporting that, having reference to Professor Von Gumpach, who, according to an intention formed in June, 1868, having resigned his appointment, was to have gone home. President Martyn had stated that Mr. Von Gumpach, still in Peking, disputes the inspector general's report concerning his resignation. The inspector general thereon proceeds to say, 'As Mr. Von Gumpach now maintained that he has never resigned, the yamên is requested to consider the despatch reporting him to have resigned as not written.'"

"Just as the yamên was drafting its reply, another despatch was received from the inspector general, dated 28th November, and which states:

"The inspector general's last despatch, requesting the yamên to cancel a former despatch reporting Mr. Von Gumpach's resignation, was duly communicated to Mr. Von Gumpach by President Martyn. Professor Von Gumpach has now written to say that it is his intention to leave Peking on the 28th of November to go to Shanghai to procure a legal decision in those 456] matters wherein he considers the *inspector general's action wrong, and he requests that the same may be reported to the yamên.

"On the 28th, Professor Von Gumpach left Peking.

"In acting thus, and in leaving without permission, Professor Von Gumpach appears to the inspector general to be doing what, if allowed to pass unnoticed, may be harmful to the interests of the Tung-wên-Kwan. The yamên is, therefore, requested to consider the matter, and, issue instructions for the inspector general's guidance."

"Having received the foregoing report, the yamên, in reply, has now to state that, in view of the action thus taken by Professor Von Gumpach, it is not fitting that he should be any longer retained as a professor in the said college.

"The inspector general is accordingly hereby instructed to acquaint the president with the yamên's decision, and to intimate the same to Mr. Von Gumpach.

"The yamên, in conclusion, leaves it to the inspector general to be guided by circumstances in deciding whether or not to issue a year's pay and allowance for passage home to Mr. Von Gumpach."

The decision of the tsung-li-yamên was notified to the respondent on the 30th of November, and the correspondence appears to be closed by the two following letters from the appellant's secretary, Mr. Campbell, to the respondent:

"Shanghai, December 15, 1869.

"Dear Mr. Von Gumpach,

"Mr. Hart requests me to intimate to you that the president of the Tung-wên-Kwan has sanctioned the payment to you of salary for the period from the 1st October, 1869, to the 30th November, 1869, minus a sum of 158 taels, authorized to be paid on your account to Mr. Edkins.

"Believe me,

"Yours truly,

"J. D. Campbell,

"Johs Von Gumpach, Esq.,

"Chief Secretary.

"&c. &c. &c."

"* Inspectorate General of Customs. [457

"Sir,"

"Shanghai, December, 18, 1869.

"I am directed by the inspector general of customs to acknowledge your letter of the 17th instant.

"I am to hand you the inclosed check for 176 t, 2 m. balance of pay due to you at the end of November last.

"And, with reference to the concluding paragraph of your letter, I am to inform you that the tsung-li-yamên has authorized the inspector general to decide, whether or not a passage home and a money allowance of one year's pay shall be given.

"I am,

"Sir,

"Your obedient Servant,

"J. D. Campbell.

"Johs Von Gumpach, Esq.,

"Chief Secretary.

"Astor House, Shanghai."

The misrepresentations alleged in the petition to have been made by the appellant to the tsung-li yamên are, "that the plaintiff had asked to be relieved from his duties, and declined to perform them; and that he had absented himself from

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Peking at a time when his active services might be required at the College."

The proof that representations were made to the tsung-li-yamên in the terms alleged is not at all clear, particularly as to the part relating to the active services of the respondent. But it is not necessary to examine minutely this proof in considering the grounds of objection to the direction of the judge which are stated in the rule for a new trial.

The direction, so far as it relates to the misrepresentations, was as follows :

"The second issue was whether Mr. Hart, by misrepresenting that the baron (the plaintiff) was absent from Peking when he was wanted, made a false statement, and did the Chinese government dismiss him in consequence. It was a thing specially for the jury to consider, whether the representations were warranted by facts."

This is the whole of the summing up on this issue (except as to damages), and their lordships are of opinion, that it is clearly defective and erroneous. They think, in the lowest view that 458] can *be taken of the relations of these gentlemen to the imperial government, and to each other, that the representations made by the inspector general were privileged communications in the ordinary sense in which those words are understood; that is to say, communications so far justified by the occasion on which they are made, and the inference of malice which *prima facie* arises from defamatory statements is rebutted, and the burden of proving express malice thrown on the plaintiff.

The appellant was entrusted by the government with the general superintendence of the college and its professors, and it was his duty to make reports to the tsung-li-yamên upon matters relating to its management and welfare. The resignation of a professor, his absence from Peking, and any avowed disinclination or refusal to perform the duties for which he was engaged, were matters which it would be within his province to report. Reports so made, although defamatory, are *prima facie* justifiable, and the duty of making them rebuts the malice which the law implies, and renders proof of actual malice, that is of some wrong and improper motive, necessary to the maintenance of an action.

It was not denied on the part of the respondent that this qualified privilege attached to the communications made by the appellant to the yamên, but it was contended that the question was not properly raised by the form of the issues; and, further, that actual malice must be taken to have been found by the

jury. The Supreme Court appear to have adopted this contention in discharging the rule for a new trial.

But in the view taken by their lordships, the question of privilege was substantially involved in the issues to be tried. In technical strictness, perhaps, the plaintiff ought to have alleged that the representations were malicious, but it may be taken, in substance, to be so alleged in the averment that the representations were wilfully false. If, however, this be assumed in the plaintiff's favor, it follows that the proof must be the same on a traverse of that allegation as if malice had been expressly averred.

The judge ought, therefore, to have explained to the jury the relation and position of the parties, and (assuming for the present the existence of a limited privilege only) he should have told them that the action would not lie if the statements were made honestly, and in a belief of their truth, and that [459 the burden was on the plaintiff to prove they were not so made.

No such explanation, however, was given. The judge only asked the jury, whether the appellant had made false statements, and whether the representations were warranted by facts. The last question is clearly misleading. In cases of this kind, the question is not as upon a plea of the truth of the libel, whether the representations are true, or warranted by facts; but whether, although they may not be true, the defendant might have honestly believed them to be so, and made them, without malice, in the discharge of his duty.

The material word "wilfully," which might have opened the minds of the jury, although, without explanation, imperfectly, to the real issue, was omitted altogether from the question. The Supreme Court, in supporting the direction, say it was not necessary to ask the jury whether the representations were "wilfully" false, because they had the paragraphs before them which distinctly charged the defendant with making wilfully false statements. Their lordships cannot concur in this opinion and relieve the summing up from the objection made to it on this ground.

The consideration of the judge's direction by their lordships has hitherto proceeded on the assumption that there was evidence proper to be left to the jury, and on that assumption it appears to them to be wrong; but, on reviewing the proof offered at the trial, they have come to the conclusion that there was no evidence of malice to sustain the action.

Their lordships have carefully gone through the evidence and correspondence, and have not found any acts or expressions of the inspector general which indicate bad, or even unfriendly feeling towards the respondent; on the contrary, he appears to

have given consideration to his complaints and remonstrances, explained to him, from time to time, the difficulties attending the formation of the School of Astronomy, and shown a desire to mitigate the disappointment occasioned by the delay. When the respondent expressed a wish to return to Europe, the appellant did not press him to do so, but appears to have been willing either to retain him as a professor, and provide some employment for him in the college, or to accept his resignation [460] and facilitate his return to *England, offering, in the latter case, allowances which show that he was not dealing with him in a harsh or unfriendly manner. It is to be observed, that the respondent himself, in his evidence at the trial, does not suggest that any unfriendly feeling existed or was shown to him. On the contrary, he says: "I believe Mr. Hart had the best intention to carry out the schemes proposed."

It was contended that the representations themselves supply evidence of malice. It is no doubt true that malice may in some cases be inferred from the defamatory statements themselves; but where representations, if *bonâ fide*, are privileged by the occasion on which they are made, the mere circumstance that they are defamatory does not furnish that proof: — it must be shown, either from the nature of the language employed, or by extrinsic evidence, that they were prompted by bad feeling or wrong motives, and it is not sufficient in such cases that the representations are consistent with the existence of malice, they must be inconsistent with *bonâ fides* and honesty of purpose. (The cases on this point were cited and their authority recognised by this board in *Laughton v. The Bishop of Sodor and Man* ⁽¹⁾.)

The representations in this case afford no intrinsic evidence of malice. They relate only to the conduct of the respondent as a professor of the college, and it would be the duty of the appellant to make them to the tsung-li-yamên, if they were true, or he believed them to be so. But it is said the evidence proves they were untrue in fact. Their lordships are by no means satisfied that it does, on the contrary, there is much which leaves the impression, if that had been the question, that the respondent had really resigned his appointment.

With regard to the statement respecting the respondent's absence from Peking, their lordships have been unable to find the evidence of what the exact representation was. If it related to his going to Shanghai, there was foundation for it.

Undoubtedly, however, if the truth of the statements had been the issue to be tried, it would have been proper to leave the evidence to the jury; but that, as already observed, is not the issue.

⁽¹⁾ *Post*, p. 495.

The question is, whether the statements are so groundless that they afford evidence that the appellant knew and believed they *were untrue, and acted from malicious motives in making [461] them. Their lordships think that the appellant might have honestly believed he was reporting what was substantially true, and that there is no evidence from which it can be reasonably inferred that he was acting otherwise than in the *bonâ fide* discharge of what he conceived to be his duty. But it is enough to say that it is consistent with the evidence that such were his belief and motives, in the absence of any proof that he really entertained hostile or unfriendly feeling towards the respondent. The respondent, therefore, failed to sustain the burden, thrown upon him by the law, of proving actual malice.

Having come to the above conclusions, it is almost unnecessary for their lordships to say that, if the only question on the rule had been, whether the verdict was against the evidence, they must on that ground have directed a new trial. They now advert to this part of the rule, chiefly because the court in their judgment seem disposed to renounce the exercise of the power to grant new trials in cases of verdicts against evidence, except where they are "evidently perverse." The judges refer to the possible inconvenience of a single judge having to exercise it. Their lordships think the court ought not thus to limit their discretion. Undoubtedly, whether the court is composed of a single judge, or many, the verdicts of juries should not be disturbed, unless the court can come to a clear conclusion, on definite grounds, that they are wrong. But when this conclusion is arrived at, it would be the duty of the court, in many cases, to act upon its own opinion. The judges below may, perhaps, have intended to allow a wider meaning to the terms "perverse verdicts" than is commonly given to them, but if the rule apparently laid down by their judgment should be really acted on, verdicts founded on mistake or prejudice would be, in effect, irreversible.

Their lordships now come to the consideration of the 22d and 24th paragraphs of the answer, which were ordered to be struck out on demurrer.

The 22d paragraph alleges, in substance, that the appellant and respondent were in the employment of the Chinese government, and that it was the duty of the appellant to report to the *yamên* upon the conduct of the professors of the college, and that, *in the exercise of such duty, and as an act of duty [462] and not otherwise, he made the representation complained of.

The 24th paragraph is to the effect, that it was the respondent's duty, by virtue of his employment by the Chinese government, to superintend the affairs of the college, and the foreigners

connected therewith, and to make such representations and reports as to him in his discretion should seem fit in the premises (not alleging to whom), and that the representations complained of were made in the exercise of his lawful authority, and of his duty as a servant of the Chinese government, and in pursuance of no other object.

These paragraphs, in their lordships' opinion, state relevant facts to raise the issue that the reports were, from the relation of the parties to the Chinese government, privileged in the limited sense before explained. The court below struck them out, on the ground that they must be taken to admit that the reports were wilfully false and, by implication, malicious. This is not clear upon the construction of the paragraphs themselves; but, looking at them with reference to the rules which regulate the nature and form of pleading in the court below, their lordships think that the order to strike them out ought not to have been made. According to these rules, pleadings are to be in the form of petitions and answers. The petition is to contain a narrative of the facts relied on, divided into paragraphs. The answer is to show the nature of the defence; it must deny the material allegations intended to be questioned, and allege "any matter of fact not stated in the petition on which the defendant relies." This is not analogous to the English system of pleading in the courts of common law, where, in general, each plea is separately regarded, and must furnish a complete answer independently of all other pleas on the record. The paragraphs of an answer are not in the nature of such separate pleas, and, unless where clearly so intended, should not be so treated. Cases may obviously occur where justice would not be done unless the paragraphs of an answer were read together. In this case the appellant, in one part of his answer, denies that the representations were wilful and false, and in the paragraphs in question alleges facts, showing under what circumstances they were 463] made. Their lordships *consider that both parts of the answer should have been allowed to remain on the record; and that, if necessary to do so, in order to ascertain the questions to be tried, the court should have settled the issues under rule 58 of the rules relating to the practice of the court. If this course had been followed, the miscarriage which occurred at the trial would probably have been avoided. On the ground, therefore, that these paragraphs of the answer allege matters relevant to the defence, their lordship think that the order for striking them out ought to be set aside and the paragraphs restored to the record.

The opinion expressed by their lordships upon the point hitherto discussed is sufficient to dispose of both the rule and

the demurrer, in favor of the appellant. But it was contended on his behalf that he was entitled to judgment on the demurrer, not merely on the ground of the limited privilege above explained, but on the higher ground that the facts alleged in the answer were sufficient to establish an absolute privilege, precluding an inquiry by an English court of law, or at least by the Queen's Court established in China, into any report, however wilfully false, and malicious, made under color of his office by the appellant to the tsung-li-yamên, concerning the respondent as a professor of the college.

Their lordships however think that the answer does not contain sufficient facts to enable them to give judgment for the appellant on this ground.

It was argued that what had been done was an act of state, and therefore, beyond the cognizance of a municipal court. But the wrong complained of is not an executive act of the Chinese government, nor of the appellant as its agent. The action is founded not on the dismissal of the respondent from his post, but on alleged false and wrongful representations which are said to have led to it. If the power to dismiss had been delegated by the Chinese government to the appellant, and he had, from whatever motives, discharged the respondent by virtue of that authority, it may be that his act should be regarded as an act of the government. But it is not necessary to consider the supposed case, or the principles which determine the effect of the acts of sovereign powers, and their agents, since the wrong complained of does not in their lordships' view fall within that category. The dismissal in this case was the act of the tsung-li-yamên, and the legality of their act is not in any way impugned.

A further contention on this part of the case was, that questions of this kind arising between officers in the service of a foreign government ought not to be entertained by an English court, although the litigants might be English subjects. It was urged that it would be against public policy and the comity of nations to allow of such inquiries.

This contention opens a question of great importance; but their lordships think that, in the present case, the facts stated in the answer are insufficient to raise it.

By the law of England, actions for libel, and other personal wrongs arising in foreign countries, may be brought in an English court; and any special circumstances which preclude the court from entertaining them should be shown (see *Mostyn v. Fabrigas* ⁽¹⁾, and the notes to that case in 1 Smith's Leading Cases, p. 623 [6th ed.], and *Scott v. Lord Seymour* ⁽²⁾).

(1) Cowp., 161.

(2) 1 H. & C., 219.

Now, the answer does not state what are the laws and customs of China with reference to reports of this kind, nor whether any protection is allowed to the officers making them, nor what specific privileges were accorded to the appellant as a servant of the Chinese government. It does not allege that he was a minister, with the duty of advising on affairs of state, or even that his reports were confidential, or that it is contrary to the law or policy of China, or the usages of the service, to allow a subordinate officer, if maliciously defamed, to seek redress in the courts.

It was admitted that the present case was one of the first impression, and no decision could be found which governs it. The immunity accorded to judges, counsel, and others engaged in the administration of justice, against actions for statements made in the course of duty, and the recent case of *Dawkins v. Lord Paulet* (*), in which the same protection was extended to reports made by a military officer for the information of the commander-in-chief, were referred to. The immunity in these 465] cases *rests upon grounds of public policy and convenience: the object being to secure the free and fearless discharge of high public duty in the administration of justice, and the maintenance of military discipline, on which the welfare and the safety of the state depend.

The principle of this rule may be capable of application to cases other than those already brought within it, but it does not seem apposite to the circumstances of the present.

Considerations of public policy arise, if at all, in this case upon the suggestion that it is contrary to the comity of nations, and therefore against the public interests of this country, to entertain a suit involving an inquiry into reports made by an officer in the service of a foreign state to the government of that state.

Their lordships are not prepared to say, that cases may not occur in which effect should be given to these considerations. If it were shown, that by the law and customs of China officers in the service of the government were absolutely protected in making reports concerning their subordinates, and that it was against the policy of the empire to allow them to be questioned by any court, it might be proper to hold that it would be contrary to the comity of nations, and, therefore, against our own public policy, having regard to this comity, to allow a subject of the queen, who had voluntarily entered into that service, to maintain such an action as the present. But this is not shown; and if the law and customs of China should be otherwise, and it is not the policy of that empire to prevent redress for a wrong inflicted under the color of official reports, in the case of such

(*) Law Rep. 3 Q. B., 94.

a servant as the appellant appears to be, then it may well be that nothing would be found in English public policy to preclude the queen's courts from entertaining the action between her own subjects.

It was then insisted that, if the queen's courts in England might entertain the action, it would still be contrary to the spirit of the treaty of Tientsin, which authorized the queen to establish courts of justice in China, that her court so established should take cognizance of it. Their lordships are unable to find in the treaty sufficient grounds for this contention.

By Article XV, "All questions in regard to rights, whether of property or persons, arising between British subjects, shall be *subject to the jurisdiction of the British authorities;" [466 and the effect of the order of the queen in council establishing the Supreme Court, and declaring its powers and jurisdiction, is, that the law of England, as between British subjects, shall be administered in it. Their lordships, therefore, are unable to declare that the same principles of law shall not be applied to the decision of the action in the court below, which would have governed it, if brought in the queen's courts in England; especially when no act of the Chinese government is impugned, and no law or custom of China is, for anything which appears, violated.

In case the action should again be taken to trial (which their lordships cannot anticipate will happen) it will be the duty of the judge to rule that the reports were privileged in the limited sense above explained, and that the action cannot be maintained without proof of express malice; and, if the same evidence only is given, to direct a verdict for the defendant, on the ground that it does not afford such proof.

Their lordships desire also to point out that, in their view, the evidence fails to connect the dismissal with the alleged false representations. The first of them, relating to the respondent's wish to be relieved from his duties, and declining to perform them, was made long before, and there is really no proof that it led to the dismissal, which proceeded on the fact that the respondent had gone to Shanghai without permission for the purpose of taking legal proceedings. It was "in view of the action thus taken by the professor," to use the words of their despatch, that the tsung-li-yamên decided "it is not fitting that he should be any longer retained as a professor of the college." It is to be observed, that it was not at all likely he would be retained after he had taken this hostile step.

It only remains to consider the money demand. It appears that the Chinese government were willing to pay 176 taels to the respondent, as the balance of his salary to November, 1869,

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and a check was sent to him by Mr. Campbell for that amount in the letter of the 18th of December, 1869. It does not clearly appear on whom it was drawn. It was suggested that the fund out of which it was payable was in the hands of the bankers of the government, and that the check was not paid owing to the 467] *refusal of the respondent to give the receipt required of him; but, however this may be, there is no evidence that the appellant had received the money, and held it, as the agent of the respondent.

This point was not raised by the rule for a new trial; but that is not now material, for, the rule being made absolute, the entire verdict will be set aside. Their lordships think it right to state that, in their opinion, no evidence whatever appears to support this claim. They think also, the 23d paragraph of the answer, which alleges that the money was entrusted to the appellant as the servant of the government to be disposed of at his discretion, is a clear answer to the demand, as it negatives that the appellant held the money as the respondent's agent or to his use. The paragraph, therefore, ought not to have been struck out on demurrer.

In the result, their lordships will humbly advise Her Majesty to direct that the order made upon the demurrer ought to be reversed, and that the demurrer ought to be disallowed with costs; and also that the order discharging the rule *nisi* to set aside the verdict should be reversed, and that in lieu thereof it should be ordered that the verdict be set aside, and, if the parties so desire, that there be a new trial of the cause. .

The respondent must pay the costs of this appeal.

Solicitors for the Appellant: *Murray & Hutchins.*

Proctors and Attorneys for the Respondent: *Brooks & Co.*

[Law Reports, 4 Privy Council, 495.]

J.C.* Nov. 15, 16, 1872.

495] *ALFRED NELSON LAUGHTON, Appellant; and THE HON. AND RIGHT REVEREND THE LORD BISHOP OF SODOR AND MAN, Respondent.

ON APPEAL FROM THE APPELLATE COURT OF COMMON LAW OF THE ISLE OF MAN.

Bishop's charge in Convocation — Libel — Privileged communication — Actual malice.

The charge of a bishop to his clergy in convocation is, in the ordinary sense of the term, a privileged communication; on the well known principle that a communication made *bond fide* upon any subject matter in which the party has an

*Present: SIR JAMES WILLIAM COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains crimimatory matter which, without that privilege, would be defamatory and actionable; provided that, the occasion on which the communication is made rebuts the *prima facie* inference of malice, in fact, arising from a statement prejudicial to the character of the plaintiff, and the *onus* is upon him to prove that there was actual malice, that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made.

So held, where the bishop of Sodor and Man, in a charge to his clergy in convocation, commented on a speech made by a barrister in his character of an advocate instructed to oppose a bill before the House of Keys, promoted by the government, vesting additional ecclesiastical patronage in the bishop, in which he impugned the conduct of the bishop, and attributed to him motives and conduct unworthy of his character and position.

Held, also, that the circumstances of the case warranted the bishop in sending such charge to a newspaper for publication, and that such course being in self defence, rebutted any presumption of malice on the part of the bishop. *Sommerville v. Hawkins* ⁽¹⁾, and *Spill v. Muile* ⁽²⁾ followed.

The cases of *Whiteley v. Adams* ⁽³⁾, and *Wright v. Woodgate* ⁽⁴⁾, recognized and affirmed.

The appellant, in this case, brought an action for libel against the respondent in the Common Law Court of the Isle of Man.

The declaration contained three counts. In the first count, the *libel case was stated to have been published by the [496 respondent at a general convocation of all the clergy of the island, and in the second the libel was stated to have been published by the respondent in a newspaper called the "*Manx Sun*." The third count was immaterial, and was abandoned at the trial by the appellant's counsel. The defendant did not plead, and by the law of the Isle of Man, where there is no plea entered it is equivalent to a plea of not guilty.

The action was tried before his Honor, John Clowes Stephen, Esquire, deemster, and a special jury, at the Common Law Court, at Ramsey, in the island, on the 15th, and five following days of February, and the 1st and five following days of March, 1870.

The deemster directed the jury, in effect, that both the reading the charge by the respondent, and also the publication of it in the "*Manx Sun*," which was admitted at the trial to have been done at the request and by the direction of the respondent, were privileged, and that the jury could only find for the appellant in case they thought that the respondent had been actuated by malicious motives against the appellant, and had exceeded his privilege; but if they thought there was such excess, then that they should give such damages as were commensurate with the excess. The jury returned a verdict for the appellant for £400 damages.

The respondent being dissatisfied with the verdict, entered a

⁽¹⁾ 10 C. B., 583.

⁽²⁾ Law Rep. 4 Ex., 232.

⁽³⁾ 15 C. B. (N.S.), 392.

⁽⁴⁾ 2 C M & R., 573.

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traverse of appeal, and a case was stated for the appellate court, pursuant to sect. 5 of the Island Appellate Jurisdiction Act 1867⁽¹⁾.

The traverse, or appeal, was heard by the Common Law Court, in June, 1870. The judges who heard the case being the lieutenant governor, the president of the court, Deemsters Drinkwater and Stephen (the judge who had presided at the trial), and the clerk of the rolls of the island, and that court, 497] after argument, *on the 29th of June, 1870, gave judgment to the effect that, whereas at the trial of the cause "the presiding judge, the deemster, charged the jury that if there was actual malice in the alleged libel — not malice in law, but actual ill will against the plaintiff, they ought to find damages for the amount of the excess;" "the court is of opinion, that such charge is wrong in law, that the document complained of was an answer to a charge previously made by the plaintiff in the action against the defendant, that the *prima facie* inference of malice was, therefore, rebutted, and that the burden of showing express malice lay upon the plaintiff. The court is further of opinion, that there was no evidence of express malice, and that the deemster ought to have charged the jury to that effect, and to have told them, that it was their duty to find a verdict for the defendant. It appears further to the court, that no new trial can be ordered under the Act of Tynwald, the Island Appellate Jurisdiction Act, 1867, there being no question of fact nor any question as to amount of damages remaining between the parties. The court, therefore, hereby order that judgment be entered for the defendant; and that the plaintiff do pay the costs of the action incurred up to and including the costs at the trial of the cause before the jury." The appeal was from this judgment.

The material facts, as they appeared in evidence, were these:

The appellant was a barrister, practising in the Isle of Man, and a bill having been introduced into the House of Keys, intituled "An Act for the division of the parish of Braddan," he was instructed to oppose the bill, at the bar of the House of Keys, on behalf of certain inhabitants of the parish who had presented a petition against it. The bill had been introduced into the House of Keys by the attorney general of the island, and would, if it had become law, have vested additional ecclesiastical

(1) Section 5 enacts, that "The court shall not on hearing a traverse consider any questions as to any determination, ruling, or direction of the judge at the trial in matter of law unless the points or objections objected to or excepted to be stated in the form of a case in writ-

ing agreed to by both parties or their advocates or in case of their disagreement, to be settled by the judge presiding at the trial, and signed by him, and filed with the proceedings in the cause or suit at least three days before the hearing of the traverse.

patronage in the respondent. The appellant appeared at the bar of the House of Keys to support the petition, and, among other matters, animadverted upon the objects with which the bill had been introduced by the respondent; upon the effect of the bill and upon the manner in which the respondent had exercised his ecclesiastical patronage; and otherwise upon the respondent's management of his diocese. The bill was thrown out by the House of Keys.

The respondent afterwards in his charge, in which the alleged *libels were contained, read the same at a convocation of [498 clergy, held in the Bishop's Court, on Whit Thursday, 1868 ⁽¹⁾, and wrote to the editor of the "*Manx Sun*" a letter enclosing the charge for publication.

In the charge (amongst other things) the appellant was represented as employing arguments and language not ordinarily used by any man of high professional repute when pleading before a common jury or a parish vestry; of making slanderous statements and uncharitable imputations; of making false accusations under the apparent sanction of well informed persons; of making statements with entire disregard to truth; of being a wicked man; of making calumnious assertions; and of being guilty of the sin of bearing false witness against his neighbor.

At the trial of the action the respondent called evidence for the purpose of showing that the appellant's manner and demeanor before the House of Keys were improper and irregular, and the appellant entered into evidence to rebut this, and that what he had spoken was spoken strictly in pursuance of his instructions. The appellant also tendered evidence to show that what he had said with reference to the respondent was in point of fact true, but this evidence was objected to by the counsel for the respondent.

Sir John Karlsruhe, Q.C., and Mr. H. R. Mansel Jones, for the Appellant:

The occasion on which the libels complained of were published afforded no privilege. Even if the charge to the convocation was privileged, the publication of the charge in the "*Manx Sun*" newspaper was clearly not a privileged communication. If it is contended that the libels were privileged by reason of an attack having been made upon the respondent, and that the charge to convocation was the respondent's defence to such attack, still those parts of the charge complained of by the appellant were not necessary for the defence, and were no answers to the statements made by the appellant in his address to the House of Keys. This the respondent admitted in his

(1) See judgment *post*, p. 505, where the material parts of the bishop's charge are set out in *extenso*.

charge, which he stated was not written for the purpose of pleading his *own justification. The question of malice and [499 excess of privilege, if there was privilege, was rightly left to the jury by the deemster, and their verdict was conclusive against the appellant: *Coxhead v. Richards* ⁽¹⁾; *Hooper v. Truscott* ⁽²⁾; *Parmiter v. Coupland* ⁽³⁾; *Hibbs v. Wilkinson* ⁽⁴⁾. In *Dickson v. The Earl of Wilton* ⁽⁵⁾ Lord Campbell said, "Whether or not the occasion gives the privilege is a question of law for the judge, but whether the party has fairly and properly conducted himself in the exercise of it, is a question for the jury:" *Cook v. Wildes* ⁽⁶⁾. The publication by the respondent of his charge in convocation in the newspaper was evidence of malice for the jury; he had no privilege in defending himself to libel the appellant; all that the bishop was entitled to do, to exonerate himself from the charge of malice was to contradict the statements made by the appellant; he had no right to impute motives; and the jury, in such circumstances, rightly found that there was malice, and their verdict was conclusive, and ought not to have been disturbed: *Duncan v. Davison* ⁽⁷⁾; *Campbell v. Spottiswood* ⁽⁸⁾; *Fryer v. Kinnersley* ⁽⁹⁾; Starkie on Slander and Libel [3d Ed. by Folkherd]. p. 289, where all the cases are collected: *Cockayne v. Hodgkinson* ⁽¹⁰⁾; *Woodward v. Lander* ⁽¹¹⁾; *Toogood v. Spyring* ⁽¹²⁾; *Hunter v. Sharpe* ⁽¹³⁾. The course adopted by the appellate court in the island in directing judgment to be entered for the defendant instead of entering a nonsuit, which would have enabled the appellant to have brought his action again, was not merely irregular, but a greivous hardship and injustice on the appellant, and can only be remedied by this tribunal.

Mr. A. J. Stephens, Q.C., and Mr. B. Shaw, for the Respondent:

In the absence of express malice, the bishop's charge in convocation, and its publication in the "*Manx Sun*" newspaper, 500] were *privileged. The charge was delivered by the bishop in the exercise of his Episcopal and official duty, and the publication of it was the legitimate mode of making it known to his clergy in general: *Wason v. Walter* ⁽¹⁴⁾. Unless, therefore, the appellant can show affirmatively, that there was express malice, malice in fact, as distinct from malice at law, the ver-

(1) 2 C. B., 575.

(2) 2 Bing. N. C., 457; S. C., 2 Scott,

672.

(3) 6 M. & W., 105.

(4) 1 F. & F., 608.

(5) Ibid., 426.

(6) 24 L. J. (Q.B.), 367.

(7) 7 E. & B., 229.

(8) 3 F. & F., 421.

(9) 15 C. B. (N.S.), 422.

(10) 5 C. & P., 543.

(11) 6 Ibid., 548.

(12) 1 M. C. & R., 181.

(13) 4 F. & F., 983.

(14) Law Rep., 4 Q. B., 73.

dict against him was rightly reversed by the appellate court in the Isle of Man. All the cases that have been cited by the other side go to prove, that there must be express malice to take the privilege away. Here there was no question of malice to be left to the jury. The language used by the appellant in his address to the House of Keys far exceeded the limits of professional privilege, or, professional practice, such as we are accustomed to here; indeed it seems to have been disapproved of though not checked, by more than one member of the house; such aspersions on the bishop's motives and actions required as well as demanded contradiction, and the remarks on the tone and temper of such aspersions were not only called for, but were required from the bishop, in his own justification. The vindication of his character from such calumnies was both natural and justifiable, and the occasion he took to do it, namely, in a charge to the body of his clergy assembled in convocation, was a most proper and fitting one. Such a communication was in every respect a privileged one, and the question of malice cannot be inquired into: *Spill v. Maule* ⁽¹⁾; *Wright v. Woodgate* ⁽²⁾; *Toogood v. Spyring* ⁽³⁾; *Taylor v. Hawkins* ⁽⁴⁾; *Somerville v. Hawkins* ⁽⁵⁾. The effect of the act of Tynwald of February, 1703, which is the law of the Isle of Man, and has been recognized by the legislature in 1813 and 1872, as of statutable authority, is to protect the bishop from being accountable for any act done by him *bonâ fide* in convocation: Mills, Statute Laws of Isle of Man, p. 161. In cases of privileged communications for publication, the question, we submit, to be left to the jury is, not whether there is no evidence, but whether there is any evidence that ought reasonably to satisfy the jury that the thing sought to be established, as the malice in this case, is proved: **Ryder v. Wombwell* ⁽⁶⁾; *Jewell v. Parr* ⁽⁷⁾; *Toomey v. [502 London and Brighton Railway Company* ⁽⁸⁾; *Wheelton v. Hardistry* ⁽⁹⁾. Applying the principles of these cases, we contend, that upon the fair construction of the bishop's charge, in connection with the facts and circumstances of the case, the language used is not of such a nature as could enable this tribunal to say, that there was any evidence on which a jury could reasonably have inferred malice: *Scott v. Stanfield* ⁽¹⁰⁾; *Lawless v. The Anglo Egyptian Cotton Company* ⁽¹¹⁾. There was no evidence of malice for the deemster to leave, as he did, the question of malice to the jury, and the jury's finding can, in no event, be

⁽¹⁾ Law Rep., 4 Ex., 232.

⁽²⁾ 2 C. M. & R., 573.

⁽³⁾ 1 C. M. & R., 181.

⁽⁴⁾ 16 Q. B., 308.

⁽⁵⁾ 10 C. B., 583.

⁽⁶⁾ Law Rep. 4 Ex., 32-39.

⁽⁷⁾ 13 C. B., 916.

⁽⁸⁾ 3 C. B. (N.S.), 150.

⁽⁹⁾ 8 E. & B., 262.

⁽¹⁰⁾ Law Rep. 8 Ex., 220.

⁽¹¹⁾ Law Rep. 4 Q. B., 262.

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allowed to stand; the deemster's duty was to have explained to the jury that it was not necessarily unlawful for the respondent to make statements having a tendency to injure and lower the credit of the appellant, provided they were made *bond fide* in a belief of their truth, and in reference to his own defence against the attack made upon him. The jury were misdirected, and their finding was rightly set aside and reversed by the Superior Court.

Sir John Karlake, Q.C., in reply, cited *Davison v. Duncan* (1).

Judgment having been reversed was now delivered by

SIR ROBERT COLLIER:

This was an action of libel brought by the appellant, who is a barrister practising in the Isle of Man, against the bishop of Sodor and Man.

The libel complained of is contained in a written charge read by the bishop to his clergy assembled in convocation, and afterwards published by his authority in the "*Manx Sun*" newspaper, a part of which charge purported to be a reply to a speech impugning the conduct of the bishop addressed by the plaintiff, as an advocate, to the House of Keys in opposition to a bill. The bishop pleaded a general denial of the allegations in the declaration. The case was tried before one of the deemsters 502] and a special jury. The deemster, after defining the legal meaning of libel left it to the jury to say, whether the language of the charge was or was not a libel. He further thus directed them: "In my opinion the occasion upon which the alleged libel was committed was a privileged occasion, subject only to this — that if there was malice, actual malice, express malice, you will find a verdict against the bishop for the excess." The jury found a verdict for the plaintiff, with £400 damages.

This verdict was set aside by the appellate court of the isle, on the ground, that there was no evidence of express malice which the deemster was justified in leaving to the jury, and judgment was entered for the defendant, in pursuance of a power given to the appellate court by a local act, entitled the Appellate Jurisdiction Act, 1867.

It has been argued before their lordships, that the delivery by the bishop of his charge to the clergy in convocation fell within the category of communications absolutely privileged, with respect to which the question of malice cannot be inquired into, such as the charge of a judge to a jury, or a speech delivered in parliament.

Inasmuch, however, as one count in the declaration is founded upon the bishop's sending a report of his speech to a news-

(1) 7 E. & B., 229.

paper for publication, a proceeding certainly not entitled to such absolute privilege, the decision of this question could not dispose of the appeal, and their lordships deem it enough in the present case to determine, whether or not the communication was a privileged one in the ordinary sense in which that term is used, that is to say, a communication made under such circumstances that the *prima facie* inference of malice which the law draws from all libellous expressions is rebutted, and the burden of proving express malice thrown upon the plaintiff.

In order to determine this question as well as that of express malice which arises if it be determined in favor of the defendant, it is necessary to examine the character of the attack to which the charge of the bishop purports to be a defence, and the circumstances under which that attack was made.

It appears that a bill was prepared by the attorney general under the direction of the lieutenant governor, intituled "An Act *for the division of the parish of Braddan." It is proposed to sever from that parish as much of the town of Douglas as is contained within it, dividing the severed district into three parishes, and conferring on the bishop the right of appointing vicars to two of them, St. George and St. Thomas, reserving to the present vicar of Braddan all fees and offerings to which he was entitled. It should be observed that a dispute was pending between the bishop and the vicar of Braddan as to the patronage of St. Thomas' Chapel, and that the bill would practically have settled that dispute in favor of the bishop.

This bill was introduced into and passed through the council, whereupon a public meeting was held, described to be of a somewhat exciting character, in which resolutions were passed for petitioning the House of Keys against it; this meeting was addressed — it is said effectively — by Mr. Laughton, the appellant, who was retained as counsel to oppose the bill before the House of Keys.

The purport of the speech of Mr. Laughton to the House of Keys, which is said by one of those who instructed him to have been made altogether in pursuance of his instructions, was to the following effect :

He contended, that the bill, though nominally that of the attorney general, was in reality that of the bishop. That the bishop, under the cloak of anxiety for the public welfare and the cure of souls, in reality sought only increased patronage for himself, at the expense partly of the vicar of Braddan, his conduct to whom was described as an attempt "to take by violence the property of his neighbor." After enforcing these views, not only by argument, but by invective and sarcasm, much applauded by a large number of persons, who, as well as the mem-

bers of the house, appear to have heard the speech, Mr. Laughton proceeded to a general attack upon the bishop in these terms:

"His lordship came here in 1854, and what has he done in the way of patronage? Has he so supported the Manx church as to entitle himself to the support and confidence of the Manx clergy and the Manx people? Has he advanced the spiritual interests of the diocese over which he was appointed? Has he been careful in all ways to do that which would be for the good of the souls committed to his charge? Or has he not, by act 504] after act, till the *whole island has echoed and re-echoed with cries of 'shame!' brought a foul stain and scandal upon the church?"

He concluded his speech, during the course of which the speaker of the house more than once intimated to him, that he was exceeding his province as an advocate, in the following terms:

"The report of the sentiments and opinions uttered here will go forth through the press; and, probably, from this time we may date the restoration of the Manx church, and its future advancement may be substituted, for what has hitherto been decided retrogression."

It is to be observed, that he here refers not merely to the facts which he was instructed to state, and the arguments founded on them, but to "sentiments and opinions" which the bishop may not unreasonably have supposed to have been uttered by him fully as much in his character of a Manx man, as in that of an advocate.

It was to this speech, that the bishop in the next assembling of his clergy in convocation thought it proper to reply, and their lordships are clearly of opinion, that his charge was a privileged communication, in the ordinary sense of the term, on the well known principle that a communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without that privilege, would be defamatory and actionable; *Whiteley v. Adams* ⁽¹⁾.

The bishop had manifestly an interest in explaining and defending his conduct, if indeed it were not strictly his duty to do so, and the clergy were deeply interested in that explanation and defence.

It does not necessarily follow that the publication of the charge

⁽¹⁾ 15 C. B. (N.S.), 892.

by the bishop in the local newspaper was equally privileged. Considering, however, that the laity as well as the clergy are deeply interested in the character of their bishop in his conduct of the affairs of his diocese, and that the speech impugning his character and conduct had been addressed to both clergy and laity, and conveyed to both by the press, their lordships are of opinion, that the bishop was privileged in addressing his defence to both through the same channel which had conveyed the attack, *provided that he did this *bonâ fide* for the purpose [505 of vindicating himself, or of informing the public upon matters which they were concerned to know, and not of defaming or injuring the appellant.

For these reasons their lordships agree with both the courts of the isle in holding that the communication was a privileged one in the sense before explained.

The only remaining question is, whether or not there was evidence of express malice on the part of the defendant, which ought to have been submitted to the jury; not indeed a mere particle or scintilla of evidence, but such as could reasonably support a finding for the plaintiff. Express malice, or as it is sometimes called "malice in fact," as distinguished from malice inferred by law, is defined by Parke, B., in *Wright v. Woodgate* ⁽¹⁾, wherein he thus expresses himself: "The proper meaning of a privileged communication is only this; that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made."

It has been contended, that malice in this sense, is to be inferred from the language of the bishop's charge, and undoubtedly a privileged communication may be couched in language so much too violent for the occasion as to afford in itself evidence of malice, whereby the privilege is forfeited.

The parts of the charge relied upon by the plaintiff are the following:

"The result of this unavoidable proceeding is now, unhappily, too well known. The act was proposed by the attorney general of this isle as a public act; and he consented to make himself personally responsible for it; I declined to do so for reasons which I am not at liberty to state. Vested interests, and the spiritual welfare of the whole town of Douglas, were carefully provided for, and a special clause was inserted preserving to

(1) 2 C. M. & R., 577.

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the present vicar of Braddan his alleged legal rights. After 506] protracted discussions *this proposed measure was passed by the council, and sent by the lieutenant governor to the House of Keys.

"It grieves me much to be obliged to speak of the reception which it (the bill) met with in this branch of the insular legislature. But regard for the church of this isle, for my own official influence in this diocese, and for my own personal reputation, compel me to record, where alone I can speak on such a subject with becoming regard for the dignity of my office, my emphatic protest against the manner in which this proposed measure was treated by the House of Keys; and to express my surprise that any legislative assembly, however constituted, should have deliberately, and with fore-knowledge of what was intended, permitted a gross personal attack to be made, in its presence, upon a member of the council, without any previous notice being given him; and that it should have encouraged unproved charges against the bishop of the diocese, of a serious nature, to be made the basis of an argument for refusing even to consider the bill as a public measure; and for treating it as a private act, introduced by the bishop of the diocese, under false pretences, and with other objects than those which were clearly stated in the preamble of the bill.

"If the statements to which I refer, and the language permitted in making them, had been addressed to any other audience in any other place, I should have treated them as unworthy of any serious attention. But when they were deliberately uttered by counsel at the bar of the House of Keys, pleading in behalf of one of my own clergy and others; and when no member of that house challenged the accuracy of his statements of facts, though some protested against the intemperance of his expressions; and when arguments and language were employed with reference to myself which are not ordinarily used by any man of high professional repute, even when pleading before a common jury or a parish vestry, the influence produced by such a proceeding, throughout so small a community as ours, is calculated to be of very serious consequence, indirectly, to the church in this diocese; and the practical result must be to deter me from making any other attempt to remedy, by local legislation, any of those difficulties which have grown up among us, 507] from time to time, affecting our *spiritual work, and which are becoming day by day of increasing importance.

"*Magna est veritas* is, however, an aphorism of general application, though it is sometimes very slow in counteracting the effect of slanderous statements, boldly made, and of uncharitable imputations: and we all know how any refutation, however

complete, of false accusations, propagated under the apparent sanction of well informed persons, frequently fails in having its due weight with ill-disposed persons, against the conclusions of preconceived prejudices and of foregone conclusions.

"Meanwhile *mens conscia recti* must be the solace of any public man who, in the discharge of his official duties, has to exercise authority in opposition to old customs, or to private interests, or to private judgment, as much as to his own personal inclinations; and *fiat justitia ruat cælum* must be, in a special sense, his rule of action who is called to maintain order and discipline, as well as to teach unwelcome truths, in the household of a heavenly Lord and Master.

"It is not my intention, my reverend brethren to plead, as it were, before you my own justification, in reply to the indictment which has been preferred against me in another place, under circumstances of a peculiarly grievous nature. You neither desire it nor need it. The time may yet come when a proper opportunity will be given me of exposing the entire disregard to truth which characterized the statements of which I have so much reason to complain. I can only remind you once more that the whole body of our church must necessarily suffer by whatsoever impairs the functions of any one member thereof; and I think it hardly needful for me to assure you that, as I should feel it to be my bounden duty to defend the humblest curate under my charge to the best of my ability, against any false imputations injuriously affecting his ministerial influence, so I am, for the church's sake, constrained to protect the office which I hold from the assaults of wicked men; and this is the only time and place which enables me to do so with due regard to the dignity of my office; and what a learned judge (Coleridge) has said, remains true, 'What does not withstand, has no standing ground.'

"Doubtless it is to such a feeling, or what we, in common parlance, characterize as '*esprit de corps*,' or rather, loyalty to the church, as a church, and to each other as brethren, which impelled some of those who were directly or indirectly implicated in charges preferred against their diocesan unjustly to state publicly facts in refutation of calumnious assertions: and, as far as it was in their power to do so, to correct mis-statements. To them some acknowledgment is due from me of an uncommon exercise of honor, and of courageous right feeling; knowing, as they must have done, that they exposed themselves thereby to misrepresentations of their animus, and their motives. It would have been well, in my judgment, for the church and for themselves, if others having (as we all know they had) the power to do so had acted likewise; or rather been

the first to set the example of doing so. However dignified such a course may be in a man who is conscious of his own integrity, self-complacency in treating the sin of bearing false witness against a neighbor with 'silent contempt' is not at all times, and under all circumstances, a sign of honorable manliness; especially not so, when public or private utterances are seemingly encouraged, which are manifestly prejudicial to the reputation and influence of a brother or a friend, who bears with them, in common, though with various measures of responsibility, the title of 'fellow citizen with the saints, and of the household of God.' "

Some expressions here used undoubtedly go beyond what was necessary for self defence, but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications.

The rule on this subject is thus expressed by the Court of Common Pleas in *Somerville v. Hawkins* ⁽¹⁾: "It certainly is not necessary, in order to enable the plaintiff to have the question of malice submitted to the jury, that the evidence is such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence."

The rule thus laid down has been since recognized by the Court of Common Pleas in *Harris v. Thompson* ⁽²⁾, by the Court of Queen's Bench in *Taylor v. Hawkins* ⁽³⁾, and more recently in *Spill v. Maule* ⁽⁴⁾ by the Court of Exchequer Chamber. In the last case the communication *prima facie* privileged, described conduct of the plaintiff admitting of two interpretations as "dishonest and disgraceful." In delivering the judgment of the Court of Exchequer Chamber the chief justice thus expressed himself: "The presumption of law being in favor of the absence of malice by the defendant, and the only evidence of malice being his description of acts done by the plaintiff, which were capable of a two-fold construction, that presumption of innocence which attaches to the writer must also, where his act is capable of a double aspect, still attend him. Starting with the presumption of innocence in his favor, we must presume that the defendant did entertain that view of the plaintiff's acts which

⁽¹⁾ 10 C. B., 590.

⁽²⁾ 13 C. B., 333.

⁽³⁾ 16 Q. B., 808.

⁽⁴⁾ Law Rep. 4 Ex., 232.

induced him to believe, and honestly to believe, and say, that the plaintiff's conduct was dishonest and disgraceful. We have not to deal with the question whether the plaintiff did or did not act dishonestly and disgracefully; all we have to examine is, whether the defendant stated no more than what he believed, or might reasonably believe; if he stated no more than this, he is not liable" (1).

Adopting the principle of these cases, their lordships do not think it necessary to determine, whether or not the language of Mr. Laughton was such as is ordinarily used by barristers of high reputation, nor whether or not the accusations against the bishop were false, or false as to the knowledge of the plaintiff or of those who instructed him, or whether they were preferred honestly or wickedly. It is enough that, having regard to the circumstances and nature of the attack upon him, the bishop may, in their lordships' opinion, have honestly believed that everything which he said was true, and proper for his own vindication, although, in fact, some of his expressions exceeded what was necessary for it; and that the language of his charge 510] is more consistent with such *honest belief, and with the purpose of self-vindication, than with that of injuring the plaintiff. This being so, the deemster ought to have decided in accordance with the case of *Somerville v. Hawkins*(2) that the language of the charge afforded no evidence of malice to be submitted to the jury. Had the bishop referred to the conduct of the plaintiff on any other occasion than that of his addressing the House of Keys, or made any general attack upon his private or professional character, the case would have been different. Some attempt was made to show malice by evidence extrinsic of the bishop's charge. His neglect to answer the plaintiff's letters was relied on in the court below, but little before their lordships, because the explanation was sufficient that the letters were sent to the bishop's legal adviser to be answered by him. It was contended that malice was to be inferred from the bishop's advocate objecting at the trial of the action to the proof of the truth of the plaintiff's statement, and endeavoring to prove the impropriety of the plaintiff's demeanor, but their lordships concur with the appellate court that no such inference could be properly drawn. Lastly, it was insisted that the sending of the charge to the "*Manx Sun*" was evidence of malice. This was, in itself, under the circumstances already adverted to no such evidence, but if there had been evidence of malice *aliunde*, it would have been proper to put to the jury the question, whether the charge was sent to the newspaper *bonâ fide*, or maliciously in the sense before explained.

(1) Ibid. p. 237.

(2) 10 C. B., 576.

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For the above reasons their lordships will humbly advise Her Majesty that the judgment of the appellate court of the Isle of Man be affirmed, and this appeal dismissed with costs.

Solicitors for the Appellant: Messrs. *Gray, Johnston, & Mounsey.*

Solicitors for the Respondent: Messrs. *Park & W. B. Nelson.*

[Law Reports, 4 Privy Council, 511].

J.C. *Dec. 8, 1872.

511] *JOHN REDPATH AND OTHERS Appellants; AND JAMES ALLAN AND OTHERS RESPONDENTS.

THE "HIBERNIAN."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF LOWER CANADA.

Lower Canada, Law of—*Statutes, 27 & 28 Vict. c. 13, s. 14, and 27 & 28 Vict. c. 58, s. 9*—*Collision—Compulsory Pilotage.*

The Canadian Statute, 27 & 28 Vict. c. 13, intituled "An Act to amend the Laws respecting the navigation of Canadian Waters," enacts, by sect. 14, that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such within any place where the employment of such pilot is compulsory by law;" and the Canadian Statute, 27 & 28 Vict. c. 58, s. 9, enacts, that "The master or person in charge of each vessel exceeding 125 tons, coming from a port out of the Province of Quebec and leaving the port of Quebec for Montreal shall take on board a branch pilot, for and above the harbor of Quebec, to conduct such vessel, under a penalty equal in amount to the pilotage of the vessel, which penalty shall go to the decayed pilot fund:" Held on appeal, affirming the judgment of the Vice Admiralty Court of Lower Canada, in a cause of damage by collision, that these statutes are to be read and construed together as being *in pari materia*, constituting a compulsory pilotage, and exonerating the owner of a vessel having such pilot on board from liability for damage inflicted on another vessel.

Where a statute inflicts a penalty for not doing an act provided for, the penalty enacted implies that there is a legal compulsion to do the act in question, and this principle is not affected by the fact that the penalty has a particular destination.

This was a cause of damage promoted by the appellants, as the owners of certain bags of sugar which were laden on board of two barges called the *A. McFarren* and the *Dora*, against the steamship *Hibernian*, owned by the respondents, for the recovery of damages caused by the loss of the sugar by reason of a collision which happened between the barges and the steamship *Hibernian*.

512] *The collision happened shortly before noon on the 16th

* *Present*:—SIR JAMES WILLIAM COLVILLE, SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

of June, 1868, in the river St. Lawrence, between Pointe aux Trembles and Vareunes, off Isle à l'Aigle.

The Hibernian was a mail steamer of 1391 tons register, and was proceeding down the St. Lawrence on a voyage from Montreal to Liverpool, with cargo and passengers.

The Hibernian was in charge of a duly licensed branch pilot for the river St. Lawrence, whose duty it was to pilot her from Montreal to Quebec. The barges were proceeding up the St. Lawrence in tow of a steam tug boat called the Canada. The consequence of the collision was that the barges sank.

By the Canadian statute, 27 & 28 Vict. c. 13, s. 14, it is provided, that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any place where the employment of such pilot is compulsory by law.

By another Canadian statute, 27 & 28 Vict. c. 58, ss. 9, 10, relating to the Trinity House of Montreal, all vessels of more than 125 tons burden navigating the St. Lawrence, between Montreal and Quebec, are bound to take on board a duly licensed branch pilot, or to pay a penalty to the decayed pilot's fund equal to the amount that they would have had to pay for the pilotage. By sects. 2 and 3 of the same statute, pilots are required to pilot any vessel for which they are engaged, and masters of vessels are allowed to choose what pilot they would employ, subject to certain restrictions. By the statute relating to the Trinity House of Quebec, 12 Vict. c. 114, s. 55, it is enacted, that any vessel entering the St. Lawrence without a duly licensed pilot on board, shall be bound to take the first duly qualified pilot that offers, without any power of selection.

On the 11th of November, 1870, an action, which had been commenced by the Northern Transportation Line, as the owners of the two barges, the A. McFarren and the Dora, which had contained the sugar, for their loss, was consolidated with this cause of damage.

The case was heard before the honorable Henry Black, C.B., the judge of the Vice Admiralty Court of Lower Canada, now the Province of Quebec, assisted by two nautical assessors.

The facts which were proved with respect to the employment by the respondents of the pilot, were as follows:

The pilot, Aldophe Lisée, was licensed pilot, and had been usually employed by the respondents since the year 1860, [513 taking his turn with two other pilots, who were also in their employ, in piloting the mail steamers belonging to the Montreal Ocean Steam Ship Company, of which the respondents were the owners, between Montreal and Quebec. The pilots so engaged

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were free from the duty imposed upon other pilots for the port of the St. Lawrence between Montreal and Quebec, of piloting any vessel whose owners engaged them with the consent of the master of the Montreal Trinity House, but, being qualified branch pilots, they occasionally piloted other vessels when not employed in piloting the mail steamers.

The nautical assessors, in reply to questions put to them by the judge found, amongst other matters, that the collision did not arise from unavoidable circumstances, they stated, "that the barges were sunk without any fault or defect attributable to them or their crews, or to the Canada, by which they were towed, and the blame rested with the Hibernian alone. That the collision did not arise from any fault of the officers or crew of the Hibernian, but solely and exclusively from that of her pilot," and that the Canada, her tows, and their crews, were not to blame for the collision, as it is known that a tug steamer with so many vessels in tow could alter her course readily, and the Hibernian having seen her so far off ought to have known this, and taken proper precautions in time to prevent collision.

In these findings the judge of the Vice Admiralty Court concurred, but on the 2d of December, 1870, gave judgment, dismissing the owners of the Hibernian from the suit, upon the ground, that the master was bound to take a pilot on board and place him in charge, in conformity with the requirements of the law, and the collision having been occasioned entirely by the fault of that pilot, the owners were entitled to exemption from liability.

The appellants asserted an appeal from this decree to Her Majesty in council; but having failed to present a petition of appeal within six months, a petition was presented to the queen in council for special leave to prosecute the appeal, on the ground that the real appellants were American subjects, and were unaware that the statute, 26 Vict. c. 24, s. 23, limited the time of appealing from the Vice Admiralty Court to six months, believing that a year and a day was the time limited for appealing; 514] and on the 5th of *February, 1872, an order was made by the queen in council, granting leave to the appellants to prosecute the appeal, which accordingly now came on for hearing.

Sir John Karlake, Q.C., and Mr. H. M. Bompas, for the Appellants:

The general and maritime law of the High Court of Admiralty in England is the law that the Court of Admiralty in Lower Canada is bound to administer. The rights of suitors in the Vice Admiralty Court of Lower Canada cannot be affected, or taken away, by a Canadian statute. The suit might have

been brought in the High Court of Admiralty, who would have disregarded the Canadian statutes. This is a material consideration, and ought to conclude this case; *The Halley* ⁽¹⁾; but the judge of the Vice Admiralty Court of Lower Canada has decided the case on the construction of the Canadian statute, 27 & 28 Vict. c. 13. Section 14 of that statute exempts the owners of vessels from liability for the acts of pilots whom they are obliged compulsorily to take on board; but if that statute is applicable at all, it applies only to cases in which the particular pilot is taken on board under the provisions of the statute, and not, as in this case, where the pilot may be, and was, selected by the master of the vessel, whose servant the pilot becomes. The penalty provided by the statute makes it optional in the master to take a pilot on board: *The Creole* ⁽²⁾; *The Lotus* ⁽³⁾; and the uniform selection of the same pilot, which, it is proved in evidence, was the practice of the master of the Hibernian, was not a compliance with the compulsory provisions of the act, but only creates the relation of master and servant between the master and the pilot. The learned judge in the court below relied exclusively on *The Batavier* ⁽⁴⁾, which was a case of compulsory pilotage, and it was held that, in such circumstances, the uniform employment of the same pilot did not take away the exemption from liability under the pilot act (6 Geo. 4, c. 125, s. 55). In *The Christiana* ⁽⁵⁾ there was no option, as in this case, where the master was at liberty either to take a *pilot or pay the value of his services. In *Attorney-Gen- [515*
ral v. Case ⁽⁶⁾, the distinction between voluntary and compulsory pilotage is very clearly exemplified, and upon the principles there stated, the respondents, not being compelled by law to take a pilot on board, were clearly liable: *Carruthers v. Sydebo-
 tham* ⁽⁷⁾; *The Maria* ⁽⁸⁾. Even where the pilotage is compulsory by law, sect. 14 of the Canadian statute, 27 & 28 Vict. c. 13, sect. 13, exempts the master or owner, when the damage is occasioned by the fault or incapacity of a qualified pilot, which clearly shows that under that act the pilotage is to be deemed voluntary. All the American authorities are collected in the report of the case of *The China* ⁽⁹⁾, decided in the Supreme Court of the United States, and in which it was held, that though in the circumstance of that case the pilotage was compulsory, nevertheless the owners were not exempt from liability for the pilot's mismanagement. The object of the Canadian statutes is not to make pilotage compulsory, as in England, for the purposes of

⁽¹⁾ Law Rep. 2 P. C., 193.

⁽²⁾ 2 Wallace Jr., Rep., 485.

⁽³⁾ 11 Low. Can. Rep., 342.

⁽⁴⁾ 2 W. Rob., 47.

⁽⁵⁾ 7 Moore's P. C. Cases, 160.

⁽⁶⁾ 3 Price, 302.

⁽⁷⁾ 4 M. & S., 77.

⁽⁸⁾ 7 Wallace's Sup. Court (U. S.) Rep., pp. 53, 67.

⁽⁹⁾ 1 W. Rob., 95.

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navigation, but simply to encourage pilots by creating a common fund from the dues given them for the benefit of the pilots themselves. *The Peerless* ⁽¹⁾, and *The Halley* ⁽²⁾, were cases of collision in foreign waters, and the principal question in those cases was, what law was to prevail.

Mr. C. Butts, Q.C., and Mr. E. C. Clarkson, appeared for the Respondents.

Their lordships intimated to the respondents' counsel that they would consider the case and the authorities referred to, before calling on them, and ultimately gave judgment without hearing them.

Dec. 17, 1872.

Judgment was now delivered by

SIR ROBERT PHILLIMORE :

This is an appeal from a decree, of the judge of the Vice Admiralty Court of Lower Canada, in a cause of damage brought 516] *by the owner of a certain cargo laden on board of two barges, against the steamship *Hibernian*. The collision happened in the river St. Lawrence between *Pointe aux Trembles* and *Varennas*, off *Isle à l'Aigle*. The *Hibernian* was a large mail steamer, proceeding with cargo and passengers down the St. Lawrence, on a voyage from Montreal to Liverpool: the barges were proceeding up the river, in tow of a steam tug. The *Hibernian* ran into the barges and sank them. The court below found that the *Hibernian* was alone to blame for this collision, and the justice of this decision has not been controverted; but the court below also found that the *Hibernian* was at the time of the collision under the charge of a pilot, taken on board by compulsion of law: and that, therefore, his owners were exempt from the liability which the ship would otherwise have incurred. It is from this part of the decision that the appeal has been prosecuted. It is not disputed that a proper pilot was on board; that he took charge of the vessel; gave the orders for her navigation; that they were obeyed; and that the collision ensued in consequence.

It has been contended by the appellants, nevertheless, that the *Hibernian* is not relieved from her liability. This contention is founded upon this position, that the general and maritime law is alone applicable to the case, by which law the wrongdoing vessel is bound to make full compensation to the suffering vessel for the damage inflicted upon her.

In order to sustain this position, it has been asserted — first, that the Canadian statutes, presently to be mentioned, on which

(1) *Lush.*, 30.

(2) *Law Rep.* 2 P. C., 193.

the learned judge relied, are without authority in the Vice Admiralty Court.

It has been said at the bar that this suit might, and so far the statement is correct, have been instituted in the High Court of Admiralty, which it is also said would not have taken cognizance of the statutes, and in support of this startling proposition the case of *The Halley* (¹), decided by this tribunal, was cited. Their lordships are wholly unable to follow the reasoning of counsel upon this point.

In the case of *The Halley*, the judgment turned upon a question as to the partial, or entire, adoption or rejection of the law of a *foreign country. In the present case, the law in- [517] voked is contained in an act of the legislature of a colony belonging to the crown, and ratified by the express sanction of Her Majesty.

Their lordships have no doubt whatever that this law, in every case to which it is applicable, is of binding authority, equally in the Queen's High Court of Admiralty and in the Vice-Admiralty Court of Canada, as a court of appeal from which, it is to be observed, their lordships are now sitting.

Secondly, it was argued that the Canadian statute (27 & 28 Vict. c. 58) did not make the taking of a pilot compulsory upon the Hibernian. The 10th section of that statute is as follows: "The master or person in charge of each vessel over one hundred and twenty-five tons, leaving the port of Montreal for a port out of this province, shall take on board a branch pilot from and above the harbor of Quebec, to conduct such vessel, under a penalty equal in amount to the pilotage of such vessel, which penalty shall go to the decayed pilot fund."

It was contended that, by the language of this section, no compulsion is put upon the master to take a pilot, but that for not doing so merely a penalty is imposed. That, though the term "penalty" is used, it is only meant in the sense of an order to contribute to a particular fund — the support of which is a matter of public policy. But their lordships are of a different opinion; they hold that when a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question; and that this principle is not affected by the fact that a penalty has a particular destination.

Various decisions in the courts of the United States of North America, and especially one of very high authority in the Supreme Court, were cited for the purpose of showing that such an order, with respect to taking a pilot, as is contained in the section referred to, does not release the ship from the liability, the *obligatio ex-delicto*, which, by the general maritime law, attaches to the

(¹) Law Rep. 2 P. C., 198.

wrongdoer; and it certainly does appear that upon this point the decisions of the American courts are at variance with the later decisions of the High Court of Admiralty, affirmed by the judicial committee of the Privy Council; this variance is certainly much to be regretted, but if it were necessary to decide 518] the present case upon *this point alone, their lordships would think themselves bound to follow the precedents of the English courts. It is to be observed, however, that no decision has yet been given by the American courts upon the effect of a statute releasing in express terms a wrongdoing vessel from liability, upon the ground of compulsory pilotage. In the case of *The China*, decided by the Supreme Court, Mr. Justice Swayne observed: "The New York statute creates a system of pilotage regulations. It does not attempt, in terms, to give immunity to a wrongdoing vessel. Such a provision in a state law would present an important question, which, in this case, it is not necessary to consider ⁽¹⁾."

The other Canadian statute, to which reference must now be made, is 27 & 28 Vict. c. 13, entitled "An act to amend the law respecting the navigation of Canadian waters," in which waters, it is to be borne in mind, this collision took place. By the 14th section it is enacted that "no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any place where the employment of such pilot is compulsory by law."

Their lordships entertain no doubt that these two Canadian statutes are to be read and construed together as being *in pari materiâ*, and that the owner of a ship navigated in Canadian waters, under the directions of a pilot taken on board in compliance with the provisions of these statutes, employs the pilot so taken on board by compulsion of law, and, therefore, except in circumstances of special exception, which it is not necessary to enumerate, is expressly exonerated, according to the law of Lower Canada, from all liability to compensation for damage inflicted upon another vessel in consequence of obedience to such directions.

It remains only to notice the argument that the pilot in this case was selected by the master, and, therefore, that the relation of master and servant subsisted between the pilot and the captain, representing the owners. We think this argument is unsound. The 2d section of the former Canadian Act enacts that "The registrar of the said Trinity House at Montreal shall record in a register, to be kept by him for that purpose, the 519] names and *residence in Montreal of all such branch pilots

(1) 7 Wallace's Rep. Sup. Court (U. S.) Rep., p. 67

as shall so report themselves, from amongst whom it shall be competent for all shipmasters and others requiring branch pilots to select such pilot or pilots as they may think fit, other than those actually engaged to pilot the ocean mail steamers, or any of them, and to indicate to the said registrar the name or names of such pilot or pilots as they may select," &c.

It is plain that the epithet "such," here applied to pilot, refers to the particular qualified class out of which the master is obliged to select one person, and their lordships are of opinion, that this restriction operates to destroy the relation of master and servant which would arise in the case of a free choice made by the master.

Their lordships will humbly recommend Her Majesty to affirm the decree of the Vice Admiralty Court, and to dismiss this appeal with costs.

Solicitors for the Appellants: *Bischoff, Bompas, & Bischoff.*

Solicitors for the Respondents: *Gellatly, Son, & Warton.*

[Law Reports, 4 Privy Council, 519.]

*J.C. July 4, 5, 1872.

MALCOMSON Appellant; and THE GENERAL STEAM NAVIGATION COMPANY Respondents.

THE RANGER AND THE COLOGNE.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Ship and Shipping — Collision — Steering and Sailing Rules — Navigation of the River Thames.

It is the general practice for steam vessels going down the river Thames to keep on the north side. If, therefore, a vessel rounding a bend on the north side, under a port helm, on her way up the river, sees the red light of one rounding *the same bend on her way down, over her starboard bow, and nearer the [520 north side than she is herself, she is not justified in supposing that the vessel coming down will cross her north, and pass her on her port side.

Vessels, under these circumstances, are not crossing vessels within the meaning of the 14th article of the Steering and Sailing rules.

The rule laid down in *The Velocity* (1) followed.

THIS was an appeal and cross appeal from a decree of the High Court of Admiralty pronounced in a cause of damage instituted by the General Steam Navigation Company, the owners

*Present:—SIR JAMES WILLIAM COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH and SIR ROBERT PORRETT COLLIER.

(1) Law Rep., 3 P. C., 44.

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of the steam vessel Cologne, against the steam vessel Ranger, her tackle, apparel, and furniture, and against the owners of the Ranger intervening.

The Cologne was a paddle-wheel steam vessel of 324 tons register, and the Ranger was a screw steam vessel of 308 tons register. The collision took place in Greenwich reach, in the river Thames, on the 5th of January, 1871, a little before midnight. The Cologne was steaming down and the Ranger was steaming up the river.

The case set up on behalf of the Cologne was, that she was rounding the Isle of Dogs under a starboard helm and keeping over to the north side of the river, but, as the witnesses for her stated, being a little north of mid-channel, when the Ranger, with her green light open, was seen at a distance of about from one-half to three-quarters of a mile from the Cologne, and slightly on her starboard bow. The Cologne alleged, that the Ranger was considerably further over to the south side of the river than the Cologne, and that the Cologne was kept under a starboard helm, but the Ranger, instead of passing to the southward of the Cologne, improperly ported her helm, and so caused the collision.

The case of the Ranger was, that she was proceeding up Greenwich reach upon the north shore when the Cologne was seen a little on the starboard bow of the Ranger, at a distance of about three-quarters of a mile, exhibiting her masthead and port lights only to those on board the Ranger, and that the Cologne was proceeding in a direction to pass the Ranger upon her port side. The Ranger was kept on her course along the north shore, and the Cologne kept on as if intending to pass the 521] Ranger upon her port *side until she had neared the Ranger, and then suddenly altered her course under a starboard helm, and so caused the collision.

At the hearing, the evidence, as the appellants contended, failed to support the case of the Cologne, and fully supported the case put forward on behalf of the Ranger; but the judge of the court below (The Right Hon. Sir Robert Phillimore) found that both vessels were to blame for the collision, and pronounced accordingly. The court was assisted by two of the elder brethren of the Trinity House, who differed in opinion, and one of them did not concur in the judgment.

Both parties appealed from this judgment.

Mr. *Milward*, Q.C., and Mr. *Gainsford Bruce* for the owners of The Ranger, referred to *The Velocity* ⁽¹⁾, and *The Esk and Niord* ⁽²⁾.

(1) *Law Rep.* 3 P. C., 44.

(2) *Ibid.*, 436.

Mr. *Bull*, Q.C., and Mr. *E. C. Clarkson*, for the owners of the *Cologne*, cited, in respect to the pleadings, the rule, *secundum allegata et probata* as laid down in *The Alice* and *The Rosita* (°); *The East Lothian* (°).

Their lordships' judgment was pronounced by

SIR BARNES PEACOCK:

This was a suit for collision between two steam vessels; the steamer *Cologne*, a vessel of 324 tons register and 120 horse-power, was one, and the other was the screw steamship *Ranger*, of 308 tons register and 40 horse power. Each of the vessels complains of the other. Each says that the other was in fault, and each states that the other ran against her. The *Ranger* says that the *Cologne* ran with her starboard paddle box against her stem.

It appears that the *Cologne* was going down the river, and the *Ranger* was coming up. The accident happened on the 5th of January, 1871, between half past eleven and twelve o'clock. It was a fine night and moonlight. The tide was running up about the last quarter flood at the rate of about two knots an hour. It seems that the waterway in that part of the river was about 900 feet, and that the collision took place about 150 feet from the north *shore at a short distance from a [522 barge called the *Dumb Barge*. The question to be considered is, whether both the vessels were in fault, and if not, whether either, and which of them, was in fault.

The learned judge of the Admiralty Court found that they were both in fault, and divided the damages. Each of the vessels was a suitor in the Admiralty Court, each complains of the decision, and each appeals to this court. The *Cologne*, by adhering to the appeal of the *Ranger*, is substantially appealing. The learned judge says: "The *Cologne* was proceeding down the river *Thames*, and the *Ranger* was proceeding up the river, and, in my judgment, there is no question of practice or usage as to the navigation of one side of the river or the other, which can govern or affect this question; nor is there any rule of the regulations for preventing collision applicable to this case. I am bound to say, that the elder brethren of the *Trinity House* do not themselves agree with each other as to the vessel which was to blame in this case. The opinion, therefore, I am about to deliver is the opinion of one of the elder brethren and myself; and I think it fair to make that statement to counsel. I will read the language of the elder brother, whose opinion I am inclined to assent to, and I will read the words we have agreed to use." The words are these: "These vessels were rounding

(°) Law Rep. 2 P. C., 314.

(°) 14 Moore's P. C. Cases, 178.

the point between Greenwich and Limehouse Reaches in opposite directions, the one under a starboard helm and the other under a port helm, and rapidly altering their respective bearings from each other. They seem to have been both navigating on the north shore, and at about the same distance from the shore. The vessel coming down, the Cologne, would see the other vessel's green light, and might be induced to conclude that she intended to pass on her starboard side, and the Cologne would consequently keep on under her starboard helm. As the vessels were approaching each other at the rate of about thirteen knots, and only three minutes had elapsed from their first sighting each other, there was no time for the Cologne to have done anything to avoid a collision after seeing the Ranger's light had changed from green to red. The vessel coming up, the Ranger, would see the other vessel's red light, and might also suppose that she intended to pass on her port side, and would, therefore, keep under a port helm. When the Cologne's 523] *light changed from red to green" (it is not stated at what time that change took place) "which it would naturally do, there was no time or room for clearing each other, even by the Ranger putting her helm hard-a-port, which was done;" and then the learned judge says, "In these circumstances it seems most probable that both vessels were to blame for the collision."

Now, let us consider, was the Cologne to blame according to this finding? The learned judge says, "The vessel coming down, the Cologne, would see the other vessel's green light, and might be induced to conclude that she intended to pass on her starboard side, and the Cologne would subsequently keep on under her starboard helm." It appears to their lordships that the Cologne was not guilty of any negligence in so acting upon that conclusion.

Then, was there any fault or negligence on the part of the Ranger? The learned judge says, "The vessel coming up, the Ranger, would see the other vessel's red light, and might also suppose that she intended to pass on her port side, and would, therefore, keep under a port helm." Now, when the Ranger saw the Cologne's red light she saw it two points over her starboard bow, and, therefore, the Cologne must have been nearer to the north side at that time than the Ranger. If the Cologne was nearer to the north side than the Ranger at that time, the Ranger, if she thought that the Cologne would pass her on her port side, must have supposed that the Cologne would cross her path. Was she right in that supposition? It is stated that there is a practice for vessels going down to keep on the north side. If the Cologne had gone much to the south side she would have got where the tide against her was the strongest. There was

no good reason, therefore, for the Ranger's supposing that the Cologne would cross her path and pass on her port side. On the other hand, the Cologne saw the Ranger's green light, and she might naturally suppose that, looking to the practice of navigating that part of the river by vessels going down, the Ranger would pass her upon her starboard side, giving green light to green light.

In the case of *The Velocity* ⁽¹⁾, which has been referred to, it was held that vessels meeting under circumstances like these did not fall within the 14th rule of the regulations for preventing collisions. *That rule is, "If two ships under steam [524 are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way." If the two vessels were within that rule, the Ranger, seeing the red light of the Cologne on her starboard side, was the one to keep out of the way. In the case of *The Velocity* ⁽¹⁾ it was held, that vessels under similar circumstances were not crossing vessels within the meaning of the 14th rule. But the very circumstances which prevent the vessels from being deemed crossing vessels within the meaning of the rule ought to have led the Ranger to suppose that the Cologne was not about to cross from her starboard side, and to pass her on her port side. Lord Chelmsford in delivering their lordships' judgment in the case of *The Velocity* ⁽¹⁾, referring to the remarks of the judge of the Admiralty Court in that case, said ⁽²⁾, "The learned judge in delivering his judgment says,—'We' (that is, himself and the elder brethren of the Trinity House by whom he was assisted) 'think that the evidence establishes that the Carbon saw the masthead and port light of the Velocity alone.'" The case of the Carbon there is like the present case of the Ranger. " 'The vessels were, therefore, crossing under the rule to which I have referred,' the 14th, 'and it was, therefore, the duty of the Carbon to get out of the way of the Velocity. The course which the Carbon adopted was to port, and the elder brethren think that this was the only mode of getting out of the way in the circumstances.' But," said Lord Chelmsford, "the fact of the Carbon having seen the port light of the Velocity does not necessarily prove that the Velocity was crossing the river, as the learned judge and his assessors seem to have thought. The relative position of the two vessels when they first came in sight of each other must not alone be regarded, but also the bend of the river in the part where the collision took place. A vessel rounding the curve of the north shore would necessarily, during some part of her course, have her head slightly inclined towards the south shore, so as to exhibit her port light to a vessel in mid channel com-

⁽¹⁾ Law Rep. 3 P. C., 44.

⁽²⁾ Law Rep. 3 P. C., 49.

ing in a contrary direction, and in fact the *Velocity* was not crossing or intending to cross the river when she was seen by the *Carbon*, but was pursuing the regular course along the north shore, keeping as near to that shore as it was convenient 525] *under a starboard helm." The *Velocity* in that case was very much in the position of the *Cologne* in the present case. His lordship proceeded: "The appellant alleged that this was the well known customary track for vessels going down the river; and to establish their case in this respect they called Captain James, the principal harbor master of the river, who said, 'It is the custom that vessels going down, whatever be their tonnage or their cargo, and whether at flood or ebb tide, invariably keep on the north side, and vessels coming up invariably keep on the south side.'" Then he referred to the statement of the quartermaster of the *Dreadnought* ⁽¹⁾, who gave similar evidence and said: "That there has been a practice for vessels going down the river to prefer the north to the south side is proved by the above evidence; but that there was any custom of this kind in the strict sense of the word, to which all vessels would be bound to conform, is certainly not the fact." In another part ⁽²⁾, he says, "But, putting the regulations aside, their lordships are at a loss to discover what possible blame can be imputed to the *Velocity*. She had a perfect right to be where she was, and she was pursuing a usual course of navigation down the river, from which she never deviated until forced to do so by the peril of a collision, into which she was brought by the sudden change of course of the *Carbon*. On the other hand, the *Carbon* appears to their lordships to be wholly to blame. She knew, or ought to have known, that a vessel coming down the river had a right to run down on the north shore; and in the position in which she was, the appearances to her of the red light of a vessel on that side of the mid-channel was no indication that the vessel was in the act of crossing the river; and yet, there being nothing else to justify the belief, she acts at once upon her hasty and erroneous conclusion, and so occasions the collision."

Now, the *Ranger*, seeing the red light of the *Cologne* on her starboard bow, ported her helm and endeavored to pass the *Cologne* on her port side, between her and the north side of the river. Was she right in doing that? If, as in the case of the *Velocity*, she ought not to have supposed that the *Cologne* was crossing, she ought to have kept to the south of the *Cologne*, 526] and *then the accident would not have occurred. But instead of that she endeavored to pass the *Cologne* on her port side, and brought herself into that position in which the danger of a

⁽¹⁾ Law Rep., 3 P. C. 50.

⁽²⁾ Law Rep. 3 P. C., 51.

collision became imminent. It appears to their lordships, that the *Ranger* was wrong in porting and endeavoring to pass on the larboard side of the *Cologne*. Their lordships think, that the *Ranger* was going up the river to the north of the mid-channel where she would get the tide, but that when the vessels first sighted each other she was not so near to the north side of the river as the *Cologne*. It is clear, that when the vessels first sighted, a collision was not inevitable. They were at least half a mile (some of the witnesses say three-quarters of a mile) distant from each other at that time; and according to the rate at which the two vessels were approaching each other, taking the velocity of each it took about two minutes and a half, or three minutes, before the vessels could reach each other. There was, therefore, ample time, and there was ample room in the river, for each to have kept clear of the other. There was no danger of a collision if the vessels had adopted a proper course when they first saw each other. No doubt the danger became imminent at last, but that was in consequence of the vessels being in a wrong position; and it appears to their lordships that the danger arose from the *Ranger's* adopting a course which she ought not to have adopted.

Then, again, did the *Ranger* act properly when the collision became imminent? Could she have done anything to avoid it? Was she right in porting her helm? From the evidence it appears, that the master is asked — "Then what did she do? *A.* Altered her helm." This is speaking of the *Cologne*. "*Q.* Which way? *A.* To starboard, and I saw his green light, and I said to our pilot, 'Good God, he has got his helm to starboard.' *Q.* Which way was she going then, or trying to go then? *A.* Trying to come to the northward of us when she starboarded. *Q.* You say she opened her green light; what became of her red? *A.* Shut it in, and we lost sight of it. *Q.* Well, now, if she had kept on her course? *A.* The collision would not have occurred. *Q.* If she had not starboarded? *A.* If she had not starboarded. The court: You ascribe the collision in fact to her starboarding? The witness: Entirely. What did you do with your engines? *A.* Helm to be put hard-a-port, [527 and stopped and reversed the engines. *Q.* When did you do that? *A.* As soon as we found the *Cologne* had starboarded." Well, now the pilot says, that in putting the helm hard to port he did not mean that the vessel should act as in the ordinary case of a helm being put hard to port, because he reversed the engines, and when he put the helm hard to port he meant it, by reversing the engines, to have the effect of starboarding. But it did not have that effect, because the way upon the vessel had not been taken off by reversing the engines, and it was

proved that the *Ranger* altered her course two or three points to starboard under the port helm. If she had not altered her course under a port helm, in all probability she would have gone clear of the *Cologne*; so that the accident appears to have been caused by the fault of the *Ranger*, first in endeavoring to pass the *Cologne* on her port side, and secondly in putting her helm hard-a-port, when the vessels were almost in a state of collision. The 13th rule was not then applicable to the vessels; as held in the case of *The Velocity* before referred to. It may be, as remarked by the learned judge, that when the *Cologne's* light changed from red to green, there was no time for clearing each other. But it was by the fault of the *Ranger* that the vessels were in that position.

Their lordships, therefore, think that the accident was not caused by the fault of both, but solely from the fault of the *Ranger*.

But it has been said that the *Cologne* is not entitled to recover against the *Ranger*, inasmuch as she must recover according to the allegation in her petition. Now, in the petition she says, that "the *Ranger* was considerably further over to the south side of the said river than the *Cologne*." The word "considerably" is not necessarily to be proved to the full extent. When the vessels first came in sight the *Ranger* was further over to the south side of the river than the *Cologne*; the master of the *Ranger* proved, that he saw the *Cologne's* red light two points to his starboard bow. He certainly did say the port bow in the first instance, but he corrected himself afterwards, and it is not necessary now to inquire, whether his first statement was made by mistake or not. The fact is, that he saw her over the star-528] board bow. Then the * *Ranger* was further over to the south side of the river than the *Cologne*. The allegation proceeds: "The *Cologne* was kept under a starboard helm along the north shore, and the *Ranger*, with her green and masthead lights only open, appeared for some time to be intending to pass to the southward of and on the starboard side of the *Cologne*, as she could and ought to have done; but, instead of so passing the *Cologne*, the *Ranger* improperly ported her helm, and caused immediate danger of collision; and although the helm of the *Cologne* was thereupon put hard starboard, and her engines were ordered to be stopped and reversed, the *Ranger* with her stem struck the *Cologne* on her starboard paddle-box and side-house, and did her a great deal of damage." Their lordships think, that the case really comes within this allegation, that the *Ranger* was more to the south than the *Cologne*, and that the damage arose from her porting her helm and attempting to pass the *Cologne* on her port side.

Under these circumstances, their lordships think, that the decision of the court below ought to be reversed. They find that there was no fault on the part of the Cologne, and that the Ranger was wholly to blame: and they think it right to say, that the sailing masters, of whose experience and assistance their lordships have had the benefit, both concur in that opinion.

Their lordships will, therefore, humbly advise Her Majesty that the decree be reversed, and that the Ranger be condemned in all the damages done to the Cologne, with the costs of the court below and also in the costs of this appeal.

Solicitor for the Appellants: *Thomas Cooper.*

Solicitors for the Respondents: *Cutlarns & Co.*

[*Law Reports*, 4 Privy Council, 529.]

J. C.* Dec. 6, 1872.

*HENRY THOMAS MORTON, and others, the Owners of the [529
Steamship FRANKLAND Appellants; and WILLIAM HENRY
HEAP HUTCHINSON, and others, the Owners, Master, and Crew
of the Steamship KESTREL Respondents.

THE FRANKLAND AND THE KESTREL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Ship and Shipping — Collision — Art. 16 of Rules and Regulations for preventing collisions by Steamships.

Art. 16 of the Rules and Regulations for preventing collisions at sea provides, that "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall in a fog go at a moderate speed." A steamship navigating in a fog at a moderate speed hearing a whistle sounded many times, indicating that a steamer was approaching her, and had come very near to her, so near that if the vessels had then been stopped they would have been within hailing distance, is bound under the 16th Article not only to stop the motion of her engines, but to reverse them, so as to stop the motion of the vessel, and ought not to wait until the vessels sight each other, when such a manoeuvre may be too late.

In this case the appeal was brought from a decree of the High Court of Admiralty in cross causes of damage in suits respectively brought by the respondents, as the owners, master, and crew of the late steamship Kestrel, against the steamship Frankland, of which the appellants were owners, and by the appellants as owners of the Frankland against the respondents as owners of the Kestrel, for the recovery of damages in respect

* *Present* :—SIR JAMES WILLIAM COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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of losses severally sustained by reason of a collision between the two steamships.

530] *The collision in question happened at about 9.30 p. m. on the 23d of April, 1871, off the Norfolk coast, and the Kestrel shortly afterwards sank and was lost.

The Kestrel was an iron screw steamer, of 392 tons registered tonnage, proceeding from Rotterdam to Hull, with a general cargo and passengers. The Frankland was a screw steamer, of 541 tons register, proceeding from Sunderland to London with a cargo of coals.

The case on the part of the Frankland was, that there was a dense fog, and that she was being steered S.S.E., and making under two knots an hour; that her steam whistle was being sounded at intervals; that her proper lights were burning brightly, and a good look-out being kept; that the steam whistle of another steam vessel was heard, apparently on the starboard bow; that the engines of the Frankland were thereupon stopped, and her steam whistle sounded: that in a short time the mast-head light, and, immediately afterwards, the red light of the Kestrel became visible at the distance of about a ship's length, and about a point on the starboard bow; that thereupon the engines of the Frankland were reversed, but notwithstanding, the Kestrel approached at considerable speed, and with her port bow came into collision with the stem of the Frankland, and the owners of the Frankland charged those on board the Kestrel with having been in fault for having improperly ported the helm of the Kestrel, and having failed to comply with the provisions of article 16 of the Rules and Regulations for preventing collisions at sea.

On the part of the Kestrel it was alleged, that she was steering N.N.W.; that two steam whistles were heard, one on the port bow, and one right ahead; that the helm of the Kestrel was thereupon ported until her head was about N., when the helm was steadied; that she so continued for a short time, when the green and white lights of the Frankland became visible on the Kestrel's port bow, distant about two ships' length; that the Kestrel's engines were at once reversed, and the Frankland hailed to port her helm, but that the collision took place. The owners of the Kestrel did not by their petition charge the owners of the Frankland with any specific act of negligence.

The suits were heard on oral evidence before the judge of the
531] *court below (The Right Hon. Sir Robert Phillimore), assisted by two of the elder brethren of the Trinity Corporation, who pronounced both vessels to have been in fault on the ground, that each ought to have reversed her engines immediately upon hearing the whistle of the other, and accordingly decreed for a

moiety of the damages proceeded for, but made no order as to costs.

The appellants, the owners of the Frankland, appealed from this decree. The owners of the Kestrel, the respondents, did not adhere to the appeal, but relied on their case lodged in reply to the appeal.

Mr. *Milward*, Q.C., and Mr. *E. C. Clarkson*, for the Appellants, the owners of the Frankland :

It was proved by the evidence, that the two steamers were steering exactly opposite courses, and that the Kestrel was on the starboard bow of the Frankland, and that there would not have been a collision if the Kestrel had not ported her helm. The Kestrel was going at too great a speed, and acted improperly by porting her helm before she had ascertained the position and bearing of the Frankland. And those on board the Kestrel improperly neglected to stop her engines upon being warned by hearing the Frankland's whistle of the proximity of another steamer; while those on board the Frankland stopped her engines as soon as they heard the whistle, and immediately upon seeing the lights of the Kestrel reversed her engines, and thereby complied with the provisions of article 16 of the Rules and Regulations for preventing collisions at sea; that the evidence proved, that the collision was occasioned by the improper navigation of the Kestrel, and not in any way by any improper navigation on the part of the Frankland. They cited *The Jesmond and the Earl of Elgin* ⁽¹⁾.

Mr. *Butt*, Q.C., and Mr. *Pritchard*, for the Respondents, the owners of the Kestrel :

Insisted, that from the violence and direction of the blow, and from the other facts proved by the evidence in the cause, it was evident, that the Frankland was proceeding at an undue speed at the time when the Kestrel's whistle was heard. That when the *Kestrel's whistle was heard the engines of the Frankland [532 ought to have been immediately reversed, which had not been done.

Judgment was delivered by

SIR ROBERT P. COLLIER :

This is a case of collision between two steamers, the Kestrel and the Frankland, somewhere off the coast of Norfolk. The judgment of the Admiralty Court found that both vessels were to blame. From this judgment the Frankland appeals, but the Kestrel has not adhered to the appeal.

The main facts — which appear not to be in dispute — are

(1) Law Rep. 4 P. C., 1.

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these: The Kestrel was steering about N.N.W., the Frankland in a precisely opposite direction, S.S.E. The weather was calm, there being scarcely any wind. There was a dense fog, and the tide was flowing southward about two knots an hour.

It has been contended, that the judgment of the court below is vitiated by an erroneous finding on a question of fact as to the speed at which the Kestrel was going, and on the other side it has been said that the court was wrong in estimating the speed of the Frankland. Their lordships, after carefully considering the evidence, are of opinion that, whatever opinion they might have been disposed to form as a court of first instance, there was sufficient evidence in the case upon which the judge of the Court of Admiralty, who had the advantage, which their lordships have not, of hearing the witnesses, might reasonably find as he has done; namely, that the speed of both vessels was from two to two and a half knots through the water.

It has been, indeed, suggested that the learned judge left out of consideration a difference, well known to nautical persons, between the rate of a vessel going through the water and the rate of that vessel going over what is called the ground; but their lordships see no reason to suppose that the learned judge can have overlooked a distinction which appears so clear and obvious.

The finding of the court upon the question of negligence is in these terms: "Both vessels were going, in truth, in the most absolute uncertainty as to the proceedings of the other; and in such a state of circumstances I have had to ask myself this 533] *question,—Could anything have been done to avoid this collision which was not done? And the opinion of the court, fortified by that of its nautical assessors, is, that upon hearing the whistles of each other so near and approaching each other, each vessel ought not only to have stopped but to have reversed until its way was stopped, when it could have hailed and ascertained with certainty which way the head of the other vessel was, and which way she was proceeding, and by that means the collision would or might have been avoided." And this being the opinion of the court, it will enforce the application of article 16 of the Rules and Regulations for preventing collisions at sea, which it is always the object of this court to see carried into due and proper execution, for the due and proper execution of that rule would tend very much to prevent both loss of life and property, of which there are so many melancholy instances every week in this court." Their lordships entirely concur with the learned judge of the Court of Admiralty as to the importance of enforcing this rule. The rule is: "Every steamship, when approaching another ship so

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as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, in a fog, go at a moderate speed." As far as the latter part of the rule is concerned, both vessels would appear to have obeyed it. The question is as to the application of the first part of the rule.

The Kestrel not having adhered to the appeal must be assumed to have been in fault; and their lordships do not think it necessary to determine the precise extent to which she was in fault. It has, indeed, been argued that part of her fault was in porting her helm. Their lordships do not think it necessary to decide, whether or not she was in fault in so doing, but the inclination of their opinion is, that the porting of her helm under such circumstances cannot be properly considered as negligence on her part.

The only question in the cause is, whether or not there is sufficient evidence to justify the finding of the Court of Admiralty that there was negligence on the part of the Frankland materially contributing to the accident?

It has been argued, that the effect of the decision is, that every steamship in a fog hearing the whistle of another steamship *approaching her, ought immediately, without re- [534] ference to the distance at which the ships may appear to be from each other, or to any other circumstances, to reverse her engines. But their lordships do not understand the Court of Admiralty to have laid down any such general proposition. They understand the finding to have been confined to the circumstances of the case, and those circumstances they understand, in the opinion of the court, to have been these, as far as the Frankland is concerned: That she was navigating in a fog at a moderate speed, that she heard a whistle sounded many times, indicating that a steamer was approaching her and had come very near to her — so near indeed that if the vessels had then stopped they would have been within hailing distance — that at that point of time it was necessary for the captain of the Frankland, under the terms of the rule, not only to stop the motion of the engines but to reverse them, so as to stop the motion of his vessel, and that he ought not to have waited until the vessels sighted each other, when such a manœuvre would have been too late.

That being the view which their lordships take of the decision of the Court of Admiralty, they are of opinion that it is right; and for these reasons they will humbly advise Her Majesty that that judgment be affirmed, and this appeal dismissed, with costs.

Solicitor for the Appellants: *Thomas Cooper.*

Solicitors for the Respondents: *Pritchard & Sons.*

C A S E S

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXXVI VICTORIA.

[Law Reports, 8 Queen's Bench, 1.]

Nov. 8, 1873.

1]

*RIMINI v. VAN PRAAGH.

Bankrupt — Promise to pay Debt barred by Discharge in Bankruptcy — Bill of Exchange — Want of Consideration — 24 & 25 Vict. c. 134, s. 164 — 32 & 33 Vict. c. 83, s. 20.

By s. 164 of the Bankruptcy Act, 1861, a promise to pay a debt barred by the certificate of discharge is made void. By s. 20 of 32 & 33 Vict. c. 83 the whole of the act is repealed; but the repeal is not to affect the past operation of any enactment repealed, or affect any right accrued or restriction imposed before the commencement of the act by or under any such enactment.

A debtor and his creditors entered into a deed of composition while the act of 1861, was in operation, which deed was to have the effect on his debts as if the debtor had been discharged in bankruptcy. After the repeal of the statute by the above section, the debtor gave a bill of exchange to one of his creditors, who was barred by the composition deed, for his old debt:

Held, that the operation of s. 164 upon this transaction was preserved by the saving clause in s. 20; and the bill was therefore void.

DECLARATION on two bills of exchange, dated respectively the 2d and 20th of January, 1870, drawn by J. Van Praagh on the defendant, to the drawer's order, and accepted by the defendant, and indorsed by the drawer to the plaintiff.

2]. *Plea: That before the drawing or acceptance of the said bills, or either of them, the defendant carried on business in partnership with the said J. Van Praagh as a diamond merchant, and he and J. Van Praagh were indebted to the plaintiff, and divers other persons, and thereupon a deed was made between the

plaintiff and J. Van Praagh and their said creditors, in the words and figures following: "This deed made the 13th of July, 1869, between Benjamin Van Praagh (the defendant) and Joseph Van Praagh, diamond merchants, of the one part, and Jonah Jonas, wholesale jeweller, on behalf of and by and with the assent of the creditors of the said Benjamin Van Praagh and Joseph Van Praagh, of the other part, witnesseth that the said Benjamin Van Praagh and Joseph Van Praagh do hereby grant, bargain, sell, assign, transfer, and set over unto the said Jonah Jonas absolutely all their estate and effects whatsoever, to be applied and administered for the benefit of the creditors of the said Benjamin Van Praagh and Joseph Van Praagh in like manner as if the said Benjamin Van Praagh and Joseph Van Praagh had been at the date hereof duly adjudged bankrupt; and in consideration of the premises each of the creditors of the said Benjamin Van Praagh and Joseph Van Praagh doth by these presents release the said Benjamin Van Praagh and Joseph Van Praagh from his and their respective debts in like manner as if the said Benjamin Van Praagh and Joseph Van Praagh had obtained a discharge in bankruptcy." And the plaintiff assented to the deed and executed the same, and the defendant did all things, and all things happened, and all times elapsed necessary to make the deed binding on the plaintiff, and the other creditors of the defendant, and the said J. Van Praagh; and after the deed had become binding on the plaintiff, the bills in the declaration mentioned were drawn, accepted, and indorsed to the plaintiff, as in the declaration mentioned; and save as aforesaid there never was any consideration for the drawing, indorsing, acceptance, or payment of the said bills, or either of them, by the defendant; and the plaintiff first received and has always held the said bills without value and with notice of the premises,

Demurrer and joinder.

Littler, in support of the demurrer. The plea is bad. The deed *was only to have the effect of a discharge in bankruptcy, [3 and therefore did not extinguish the defendant's debts, but only discharged him from them so as to bar all the remedies for them. It was given in July, 1869, and therefore was under the Act of 1861, which was then in operation. But by 32 & 33 Vict. c. 83, s. 20 ⁽¹⁾, that act was totally repealed in August,

(1) 32 & 33 Vict. c. 83, s. 20: The enactments described in the schedule to this act are hereby repealed [24 & 25 Vict. c. 134, the Bankruptcy Act, 1861, in toto]; but this repeal shall not affect the past operation of any such enactment, or revive any court, office, juris-

diction, authority, or thing abolished by any such enactment, or affect the validity or invalidity of any thing done or suffered before the commencement of this act, or any right, title, obligation, or liability accrued or restriction imposed before the commencement of this

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1869, and the bills were not drawn till January, 1870. At the time, therefore, that the bills were given, s. 164, which made a bill for a debt anterior to the discharge in bankruptcy void, had been repealed; and the parties were remitted to their position at common law, and an express promise to pay an existing debt, although the debtor be protected from legal process for enforcing payment, is good: see note to *Wennall v. Adney* ⁽¹⁾. The point was expressly decided as long ago as Lord Mansfield's time in *Trueman v. Fenton* ⁽²⁾. *Flight v. Reed* ⁽³⁾ was a similar decision upon the effect of a new promise upon the same consideration as a usurious transaction, after the repeal of the usury laws.

[QUAIN, J. Section 20 expressly saves the effect of the repealed enactments as to all transactions before the repealing act came into operation.]

L. Kelly, for the defendant. The court have pointed out the answer to the plaintiff's position. But even without the saving clause, the defence would be good, as showing a want of consideration. In *Jones v. Phelps* ⁽⁴⁾, Bacon, C.J., irrespective of s. 164, was of opinion that a promise to pay a debt, from which the debtor was discharged by bankruptcy, was a mere *nudum pactum* without any consideration to support it.

Little, in reply. The cases already cited were not brought 4.] to *the notice of the chief judge in Bankruptcy; and in addition may be cited to the same effect, *Brix v. Braham* ⁽⁵⁾.

COCKBURN, C.J. I am of opinion that the plea is good. The action is on a bill of exchange given by a debtor for a debt, from which he had been discharged by a deed of composition, which was to have the effect of a discharge in bankruptcy, and which deed was executed at the time that the Bankruptcy Act, 1861, was in operation. By s. 164 of that act, the effect of a discharge of a bankrupt was, that a promise to pay, or security given for a past debt, was rendered invalid. After this deed had been executed, by s. 20 of 32 & 33 Vict. c. 83, the whole act of 1861 was repealed, and in the new act there is no corresponding enactment to s. 164. And whether the effect of this is, that in the case of a bankruptcy occurring after the act passed, a bill given for the past debt is valid, I express no opinion. It will be time enough to do so when the necessity arises. The question here is, whether the act was intended to have a retrospective effect on bankruptcies or deeds of compo-

act, by or under any such enactment, or affect any principle or rule of law derived from any enactment contained in the first and secondly mentioned acts in the schedule to this act.....

⁽¹⁾ 8 B. & P., at p. 249.

⁽²⁾ Cowp., 544.

⁽³⁾ 1 H. & C., 703; 33 L. J. (Ex.), 265.

⁽⁴⁾ 20 W. R., 92.

⁽⁵⁾ 1 Bing., 281.

sition under the act of 1861. It would be a strong thing to suppose that the legislature intended any such thing; and although it may have been intended (and as to that I express no opinion) to do away with any restraint, under future bankruptcies, upon the bankrupt voluntarily promising to pay his past debts, yet it cannot have been intended to apply this to bankruptcies or deeds under the repealed statute. No doubt the policy of the bankrupt laws has changed; but the terms of the repealed section (s. 20), are quite large enough to protect any right or immunity which the debtor enjoyed under the old act; and he could not bind himself by any promise as to a past debt, so as to deprive himself of the right, in the event of an action being brought on his promise, of setting up his discharge as a defence.

MELLOR, J. I am of the same opinion. The effect of ss. 161 and 164 of the act of 1861, is to discharge the bankrupt from all his debts; and after the order of discharge he shall not be liable even on a fresh promise to pay the debts; these enactments are *now repealed; but as to all past transactions, the [5 repealing section says the old law shall still have operation.

HANNEN, J. I am of the same opinion.

QUAIN, J. I am of the same opinion. It seems clear, and indeed it was admitted, that the bills given for a past debt discharged by bankruptcy would be void under the old statute. What, then, is the effect of the repeal of this statute? Section 20, while repealing certain enumerated statutes or parts of statutes, has a saving clause, which expressly gets rid of the repeal so far as it affects all bankruptcies and other transactions before the act passed. But even without that saving clause, the case would fall within the rule stated by Lord Tenterden in *Surtees v. Ellison* (*). "It has long been established, that, when an Act of Parliament is repealed, it must be considered, except as to transactions past and closed, as if it never had existed."

Judgment for the defendant.

Attorneys for Plaintiff: *G. S. & H. Brandon.*

Attorney for Defendant: *Edward D. Lewis.*

[Law Reports, 8 Queen's Bench, 14.]

Nov. 26, 1872.

14] *SIMPSON and another v. CRIPPIN and another.

Sale of Goods to be delivered in monthly Quantities — Rescission of Contract.

The defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into the plaintiff's wagons at the defendants' collieries, in equal monthly quantities during the period of twelve months, at 5s. 6d. per ton. During the first month the plaintiffs sent wagons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled but the defendants declined to deliver any more coal:

Held, that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract.

Hoare v. Rennie (5 H. & N. 19; 29 L. J. (Ex.) 73) discussed.

DECLARATION on a contract to supply from 6000 to 8000 tons of coal, to be delivered in equal monthly quantities during the period of twelve months, from the first of July, 1871. Breach, that the defendants did not deliver the coal monthly, and had refused wholly to deliver the coal and to perform the contract.

Plea, *inter alia*: That the plaintiffs were not ready and willing to accept the coals, and that the defendants were prevented from delivering the coals, and performing the agreement, by the acts, neglects, and defaults of the plaintiffs.

At the trial before Lush, J., at the Liverpool Spring Assizes, 1872, it appeared that the defendants were coal proprietors, and the plaintiffs were coal merchants. On the 10th of June, 1871, 15] *the plaintiffs wrote to the defendants the following letter: "We agree to take from you about 6000 to 8000 tons of your best Wigan four-feet coal, at 5s. 6d. per ton of 21 cwt. to the ton, put into our wagons at the colliery. Delivery to commence from the 1st of July next, and to be taken in about equal monthly quantities over the next twelve months. It is understood that you are not bound to supply in case of accidents or strikes. Terms, cash monthly, less 2½ per cent. discount."

The defendants, by letter also dated the 10th of June, replied as follows: "We agree to supply you from 6000 to 8000 tons of our best four-feet Wigan coal, properly screened, and free from slack, to be delivered into your wagons at our collieries, in equal monthly quantities during the period of twelve months from the 1st of July next, strikes of our workmen, accidents, and other circumstances beyond our control excepted, at 5s. 6d. per ton of 21 cwt. Terms, cash monthly, less 2½ per cent. discount."

On the 8th of July the defendants wrote, complaining that the first week for the fulfillment of the contract had terminated without the plaintiffs sending wagons or orders for coals. The correspondence continued, the defendants requesting that wagons might be sent, and the plaintiffs promising to comply. During the month of July the plaintiffs took from the defendants only 158 tons of coal. On the 1st of August the defendants wrote to the plaintiffs, that inasmuch as the latter had only taken 158 tons during the month of July, and as the sole inducement for the defendants to entertain the contract was the regular and punctual withdrawal by the plaintiffs of the stipulated quantity during the summer months, which they had failed to perform, the defendants gave notice that the contract was cancelled. On the 2d of August the plaintiffs replied, stating that they would not allow the contract to be cancelled.

On these facts the learned judge told the jury, that as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that did not justify the defendants, in point of law, in cancelling the contract and left the question of damages to them.

The jury found a verdict for the plaintiffs for £75^{l.}, leave being reserved to move to enter a verdict for the defendants.

*A rule was afterwards obtained upon the ground that under the circumstances the plaintiffs had disentitled themselves to sue for the breach of the contract, and that the defendants were entitled to cancel the contract, and refuse to deliver the residue of the coal.

Bull, Q.C., and *Commings*, showed cause. The plaintiffs are entitled to retain the verdict; the defendants could not annul the contract. The case is distinguishable from *Hoare v. Rennie* (1); in that case time was of the essence of the contract; and there is another distinction, that in the present case there was a part performance by the plaintiffs in the month of July; but in *Hoare v. Rennie* (1) there was a complete breach by the plaintiffs in the first instance. Here the contract is to deliver coals by twelve deliveries independent of each other. The case is governed by *Jonassohn v. Young* (2). This case does not fall within that class of cases, of which *Withers v. Reynolds* (3) is an example, that where a breach has been committed which goes to the whole consideration the contract may be rescinded.

Holker, Q.C., and *Baylis*, in support of the rule. The question is, whether the stipulation on the part of the plaintiffs to take coals by equal monthly quantities goes to the root of the contract so that the breach of it entitles the defendants to annul

(1) 5 H. & N. 19; 29 L. J. (Ex.), 78.

(2) 4 B. & S., 296; 32 L. J. (Q. B.), 885

(3) 2 B. & Ad., 882.

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the entire agreement. This is a case in which the breach goes to the whole root and consideration of the contract, within the meaning of the decision of Lord Ellenborough in *Davidson v. Gwynne* ⁽¹⁾. This is not a distinct stipulation for the breach of which the defendants might be compensated in damages. The conditions are mutual, and ought to have been performed on both sides, as is laid down in the notes in *Pordage v. Cole* ⁽²⁾. This case is not distinguishable from *Hoare v. Rennie* ⁽³⁾, which is supported by *Bradford v. Williams* ⁽⁴⁾, and *Coddington v. Paleologo* ⁽⁵⁾.

BLACKBURN, J. I think that the rule ought to be discharged. It cannot be denied that the plaintiffs were bound in every month to send wagons capable of carrying at least 500 tons, and [7] that by *failing to perform this term they have committed a breach of the contract; and the question is, whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of wagons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract, and they rely upon the terms of the letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract; but it is said that *Hoare v. Rennie* ⁽³⁾ is in point, and that we ought not to go counter to the decisions of a court of co-ordinate jurisdiction. It is, however, difficult to understand upon what principle *Hoare v. Rennie* ⁽³⁾ was decided. If the principle on which that case was decided is that, wherever a plaintiff has broken his contract first he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases. I prefer to follow *Pordage v. Cole* ⁽²⁾. No reason has been pointed out why the defendants should not have delivered the stipulated quantity of coal during each of the months after July, although the plaintiffs in that month failed to accept the number of tons contracted for. *Hoare v. Rennie* ⁽³⁾ was questioned in *Jonassohn v. Young* ⁽⁶⁾.

MELLOR, J. I agree generally with what my brother Blackburn has said; and I think that it is difficult to reconcile *Hoare v. Rennie* ⁽³⁾ with some of the other cases which have been cited; but I cannot distinguish that case from the present. Where the facts are not distinguishable, I think we are bound to give effect to the judgment of a court of co-ordinate jurisdiction. I should have thought, therefore, if the decision depended upon

⁽¹⁾ 12 East, 381, 389.

⁽²⁾ 1 Wm. Saund., 319L.

⁽³⁾ 5 H. & N., 19; 29 L. J. (Ex.), 73.

⁽⁴⁾ Law Rep. 7 Ex., 259.

⁽⁵⁾ Law Rep. 2 Ex., 193.

⁽⁶⁾ 4 B. & S., 296; 32 L. J. (Q.B.), 335.

me, that in deference to that case we ought to make the rule absolute, and leave the plaintiffs to appeal.

LUSH, J. I am of opinion that the rule should be discharged. I cannot understand the judgments in *Hoare v. Rennie* ⁽¹⁾. The court must have interpreted the contract in that case as if time were of its essence; there are no words here which import *such a condition. If the parties intended that a breach [18 of this kind should put an end to the contract, they ought to have provided for it by express stipulation.

Rule discharged.

Attorneys for Plaintiff: *J. & R. Gole.*

Attorney for Defendant: *J. E. Fox.*

[Law Reports Queen's Bench, 36.]

Nov. 26, 1872.

*MOORE v. THE METROPOLITAN RAILWAY COMPANY. [36]

Master and Servant — Railway Company responsibility of for Acts of Servants — Implied Authority to Arrest — Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 103 and 104.

The plaintiff was a passenger by the defendants' railway with a return ticket from M. to N. On reaching E., a station short of N., he got out, but was informed that he must pay an additional fare of 2d. This he refused to do. He was thereupon given into custody by the inspector of the defendants' station upon the charge of refusing to give up his ticket, or pay his fare, and thereby defrauding the defendants. This charge was dismissed. The plaintiff having brought an action of trespass and false imprisonment:

Held, that, as the defendants were empowered under s. 104 of the above act, to arrest persons committing frauds under s. 103, and as the inspector was their representative at E., it must be presumed, in the absence of evidence to the contrary, that the inspector had authority from the defendants to arrest persons supposed to be guilty of committing offences against that section, and that the defendants were liable for his mistake.

DECLARATION that the defendants assaulted the plaintiff and gave him into custody and compelled him to appear before a magistrate upon the charge that he, being a passenger on the defendants' railway, had refused, on arriving at Edgware Road station, to deliver up his ticket or to pay his legal fare, and thereby had defrauded the defendants of 2d.

*Plea: Not guilty. Joinder in issue. [37]

At the trial before Lush, J., at the Middlesex sittings after Hilary Term, 1872, the following facts were proved: The plaintiff was a passenger by the defendants' railway, and was travelling with a return ticket from Moorgate Street to Notting Hill. When the train arrived at the Edgware Road station, on the way

(1) 5 H. & N., 19; 29 L. J. (Ex.), 73.

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to Notting Hill, the plaintiff got out, but the ticket collector told him that the return ticket he had was not available for that station, and demanded a fare of 2*d*. The plaintiff refused to pay, and afterwards offered to pay on a receipt being given to him; this the ticket collector declined to do, and called an inspector of the station, who, on hearing the facts, sent for a policeman and gave the plaintiff into custody. He was taken to the police station and charged before the magistrate the next day with refusing to give up his ticket or pay his fare, thereby defrauding the company. The magistrate dismissed the case.

Upon these facts the learned judge ruled that there was no implied authority from the defendants to the station inspector to arrest the plaintiff, and directed a nonsuit.

A rule was afterwards obtained for a new trial, on the ground that the defendants were liable for the false imprisonment of the plaintiff by their officials under ss. 103, 104, 108, 109, 110, and 154 of 8 Vict. c. 20 ⁽¹⁾.

38] **M. Chambers*, Q.C., showed cause. The company have authority under s. 104 to arrest for offences committed against s. 103, and therefore the only authority that can be supposed to exist in the inspector is to arrest for those offences. But the alleged fraud with which the plaintiff is charged was not an offence specified in s. 103, and it follows that there was no implied authority in the inspector to give the plaintiff into custody. Section 154 must be confined to arrests for offences against the bye laws of the company. *Goff v. Great Northern Ry. Co.* ⁽²⁾ is not applicable, because in that case there was a power to arrest

⁽¹⁾ 8 Vict. c. 20, s. 103: If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof, or if any person having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect on arriving at the point to which he has paid his fare to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings.

Sect. 104. If any person be discovered, either in or after committing or attempting to commit any such offence as in the preceding enactment mentioned, all officers and servants, and other per-

sons on behalf of the company, or such other company or party as aforesaid, and all constables, gaolers, and peace officers, may lawfully apprehend and detain such person until he can conveniently be taken before some justice, or until he be otherwise discharged by due course of law.

Sect. 154: It shall be lawful for any officer or agent of the company, and all persons called by him to his assistance, to seize and detain any person who shall have committed any offence against the provisions of this or the special act, and whose name and residence shall be unknown to such officer or agent, and convey him with all convenient dispatch before some justice without any warrant or other authority than this or the special act; and such justice shall proceed with all convenient dispatch to the hearing and determining of the complaint against such offender.

⁽²⁾ 3 E. E., 672; 30 L. J. (Q.B.), 148.

on the assumption that the facts were as the officer arresting supposed. *Poultton v. London and South Western Ry. Co.* (1) is in point. This case is governed by the law as laid down in *Allen v. London and South Western Ry. Co.* (2), and *Edwards v. London and North Western Ry. Co.* (3).

Lewis Glyn, in support of the rule was not heard.

BLACKBURN, J. The facts of this case bring it within the authority of *Goff v. Great Northern Ry. Co.* (4). The nonsuit, therefore, ought to be set aside. I think that there was evidence that the person who gave the plaintiff into custody was acting with the authority of the defendants. *Goff v. Great Northern Ry. Co.* (4) was a well considered case, and the principles there laid down have never been deviated from. Where a railway company are carrying on business there are certain things which are necessary to be done for the carrying on of the business, and the protection of the company, and there are things which if done at all must be done at once, and therefore the company must have some person on the spot to do these things, a person acting with common prudence and common sense, clothed with authority to decide as the exigency arises what shall be done. *Giles v. Taff Vale Ry. Co.*, (5), [39 which was followed by *Goff v. Great Northern Ry. Co.* (4) laid down the rule that if such person intending to exercise his authority makes a mistake and does an act which cannot be justified, the company are responsible, because he was their agent. *Goff v. Great Northern Ry. Co.* (4) also decides that where there is a necessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is acting as if he had express authority, is *prima facie* evidence that he had authority, and the presumption that he had authority must be rebutted by the company. The facts of this case are, that the plaintiff had a ticket which authorized him to travel as far as Notting Hill station; but if he wished to get out at Edgware Road, a station which the train reaches before he gets to Notting Hill, he would not be permitted to get out at Edgware Road without paying 2d. more than he had paid for the whole distance to Notting Hill. The plaintiff did get out at Edgware Road, and if the plaintiff meant to get out at Edgware Road with a view to defraud the company of the sum of 2d., it would be a plausible thing for the company to say that he had violated the first part of s. 103. I do not, however, say that it would be an offence under that section. At all

(1) Law Rep., 2 Q. B., 534.

(4) Law Rep., 5 C. P., 445.

(2) Law Rep., 6 Q. B., 65.

(5) 3 E. & E., 672; 80 L. J. (Q.B.), 148.

(3) 2 E. & B., 822; 23 L. J. (Q.B.), 48.

events, the company's agent would have to determine whether the act of the plaintiff was within that section, and to consider whether, acting for the company on the spot, he should exercise his authority and give the plaintiff into custody. Being placed on the spot by the company for the express purpose of determining whether he shall exercise the power he has, the inspector makes a mistake, and the company are responsible for the consequences of that mistake.

It has been argued that unless the plaintiff had committed an offence under s. 103 the inspector at the station had no authority from the defendants to give the plaintiff into custody, and consequently the defendants were not liable; but if this were so, there never would be an action against a railway company for false imprisonment. If the plaintiff had committed the offence there would have been a defence upon the merits. It is upon the 40] ground that the servant *of the company has made a mistake that the company are liable. *Poulton v. London and South Western Ry. Co.* ⁽¹⁾ has been cited, but if that case be examined, it will be seen that it does not conflict with the present decision. There the station master had given the plaintiff into custody for not paying the fare for a horse. The company themselves could not have given the plaintiff into custody for that; and therefore the authority of the railway officials to decide what should be done on the exigency of the moment did not arise. There was no more power in that case for the company to give authority to the servant to consider and determine whether a person should be given into custody or not than there would have been to give him authority to consider whether he should assault a passenger. But *Goff v. Great Western Ry. Co.* ⁽²⁾ and the present case are different. In both these cases there were things which the company were obliged to leave to the discretion and determination of their servant, and he had to exercise the power entrusted to him for their benefit. There was, therefore, a *prima facie* case for the jury. It may be that this might work a hardship on the company, but it would be much harder upon the passengers if substantially they had no remedy when the company's servants made a mistake. I do not rely upon s. 154; ss. 103 and 104 are sufficient to show that the nonsuit was erroneous.

MELLOR, J. I am of the same opinion. No doubt s. 103 was passed with the intention of protecting the revenue of the company. I agree that by ss. 103 and 104 power is given to the defendants to arrest and detain persons acting fraudulently, and in order to carry out these provisions some person must be at the station to protect the interests of the defendants, and in case

⁽¹⁾ Law Rep. 2 Q. B., 534.

⁽²⁾ 3 E. & E. 672; 30 L.J. (Q.B.), 148.

he is of opinion that an attempt to commit any of the specified frauds has been made, he is clothed with authority to act upon the emergency, and to decide as best he may whether the supposed offender ought to be arrested. Now the inspector was clearly mistaken, but I think that the company are liable if their official did not exercise a sound discretion. The arrest was within the scope of his authority to protect the company's interests, and to prevent the commission of the frauds specified. I think *Poulton v. London and South Western Ry. Co.* ⁽¹⁾ [41] clearly distinguishable; in that case no person had power to arrest the plaintiff, and therefore the agent of the defendants had no implied authority to do an act which the company itself could not have done. But in this case the company had authority to arrest if the offence had been committed, and it is to be assumed, in the first instance, that the inspector had authority vested in him to act on the company's behalf, and it is for them to show that the inspector was not authorized to arrest the plaintiff.

LUSH, J. I am of the same opinion. I now think the view I took of the facts at the trial was erroneous, for this case cannot be distinguished from *Goff v. Great Northern Ry. Co.* ⁽²⁾. It is to be presumed that the inspector had authority from the company to exercise for their benefit the powers conferred upon them by ss. 103 and 104. The inspector supposed that the ticket authorized the plaintiff to get out at Notting Hill only, and not at Edgware Road, and that therefore the plaintiff had ridden from Moorgate Street to Edgware Road without any ticket authorizing him to take that journey. The inspector thought erroneously that this was done with a fraudulent intent, and intending to act under the 103d and 104th sections, he gave the plaintiff into custody. I think that in the absence of evidence to the contrary, it is to be inferred that the inspector had authority to arrest for offences under those sections.

Rule absolute.

Attorney for Plaintiff: *Knox.*

Attorneys for Defendants: *Burchells.*

⁽¹⁾ Law Rep. 2 Q. B., 534.

⁽²⁾ 3 E. & E., 672; 30 L. J. (Q. B.), 148.

[Law Reports, 8 Queen's Bench, 42.]

Nov. 26, 1872.

42] *DUNN AND ANOTHER v. THE COMPANY OF PROPRIETORS OF BIRMINGHAM CANAL NAVIGATION (*).

Canal Company—Rights and Liabilities as between Canal Company and Owners of subjacent Mines.

The defendant's canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defendants were authorized to take land compulsorily and construct the canal, doing as little damage as might be, and to do all things necessary for making and preserving and using the canal, making satisfaction for all damages to be sustained by the owners of lands and hereditaments taken or prejudiced by the execution of the powers of the act. Commissioners were appointed who were to determine from time to time what sum should be paid for the purchase of lands, and also to determine what other distinct sum should be paid by defendants as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the act, to work the minerals; provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three month's notice to defendants, who might inspect the mines, and might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defendants to inspect the mines the owners were authorized to work them.

The canal having been constructed and used for many years, the plaintiff, who was owner of coal mines under the canal, gave defendants proper notice of his intention to work them; defendants did not inspect, and refused to purchase. Plaintiff proceeded to work the mines, without regard to the surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably disturb the strata, and that there was danger of the water escaping from the canal into the mines; but, except as above, plaintiff did not work his mines in any negligent or unskillful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, and without doing so he could not have obtained the full benefit of his coal. The canal was in good order when plaintiff commenced working his coal; and defendants did all they could to keep the canal watertight, by puddling, &c. During part of the time, while plaintiff's working was going on, they had dammed back the water, and so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for plaintiff to work out his coal. The defendants were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata became dislocated and the water of the canal escaped through the cracks and flooded the workings, and plaintiff was obliged to abandon his coal.

The plaintiff thereupon brought an action, charging that defendants, having 43] *brought water into the canal, so carelessly and improperly managed the canal and the water, that the water escaped and flooded plaintiff's mine.

On the above facts, the court having power to draw inferences:

Held, affirming the judgment of the Queen's Bench, that an action of tort could not be maintained.

Semle, by Kelly, C.B., and Pigott, B., that the plaintiff was entitled to compensation under the act.

(*) Affirming 1 Eng. Rep., 28.

ERROR from the judgment of the Queen's Bench in favor of the defendants on a special case ⁽¹⁾.

The declaration alleged that plaintiffs were lawfully possessed of a coal mine, and that defendants brought large quantities of water into a canal near the mine, and so carelessly and improperly managed the canal and the water therein, that the water escaped and flooded the mine, whereby the mine was damaged.

The material pleas were: 1st, not guilty; 3dly, except as to the charge of negligence and improper conduct, that the water was brought into the canal in pursuance of certain Acts of Parliament authorizing the construction and maintenance of the canal; that the coal mine near to and under the canal was not worked till after the completion of the canal, and that the water escaped out of the canal into the mine without any negligence or default on the defendants' part. Issue joined.

The facts of the case and the several clauses of the Acts of Parliament are set out at length in the report in the court below ⁽¹⁾, and they sufficiently appear from the head-note.

The question for the opinion of the court was, whether the defendants are liable to the plaintiffs for the damage sustained by them, and how the findings on the issues were to be entered.

Huddleston, Q.C. (with him *J. O. Griffiths*), for the plaintiffs. First, the defendants having power, on notice of the plaintiffs' intention to work the mines, to inspect and purchase them, on their refusal the plaintiffs were remitted to their rights at common law, just as if the Act of Parliament had not passed; and then the defendants are liable, without any negligence on their part, on the principle of *Fletcher v. Rylands*. ⁽²⁾

[*CHANNELL*, B., referred to the late case of *Smith v. Fletcher*. ⁽³⁾]

*In *Wyrley Canal Co. v. Bradley* ⁽⁴⁾, under precisely similar enactments, the court were of opinion that "if the company declined the purchase, as they had done in this case, the coal owners were left to their common law rights as if no canal had been made." The judgment of the court in *Dudley Canal Co. v. Grazebrook* ⁽⁵⁾, which was under this very act, is to the same effect; and Lord Chelmsford, C., and Lord Cranworth, in *Great Western Ry. Co. v. Bennett* ⁽⁶⁾, adopted the principle of that judgment. *Stourbridge Canal Co. v. Dudley* ⁽⁷⁾ is to the same effect. [He also referred to *Fletcher v. Great Western Ry. Co.* ⁽⁸⁾; *Bagwill v. London and North Western Ry. Co.* ⁽⁹⁾, and *Barber v. Not-*

⁽¹⁾ Law Rep., 7 Q. B., 244.

⁽²⁾ Law Rep. 3 H. L., 330.

⁽³⁾ Law Rep. 7 Ex., 305.

⁽⁴⁾ 7 East, 368, at p. 372.

⁽⁵⁾ 1 B. & Ad., 59.

⁽⁶⁾ Law Rep., 2 H. L., 27, at pp. 39, 41.

4 ENG. REP.

⁽⁷⁾ 3 E. & E., 409; 30 L. J. (Q.B.), 108.

⁽⁸⁾ 4 H. & N. 242; 28 L. J. (Ex.), 147; 5 H. & N. 689; 29 L. J. (Ex.), 253.

⁽⁹⁾ 7 H. & N., 423; 1 H. & C., 544; 81 L. J. (Ex.), 121, 480.

tingham and Grantham Ry. Co. (1)] Secondly, if negligence must be shown, then there was negligence in the defendants in not purchasing, or in not keeping the water out during the plaintiffs' working. [As to this he cited the judgment of Hannen, J., in the court below. (2)] Lastly, an additional argument in favor of the plaintiffs may be urged, by reference to the compensation clauses of the act. The majority of the Court of Queen's Bench seemed to think that they would apply to the present case; but it is to be observed that "mines," although occurring in other clauses, does not occur here: see pp. 1603-4. (3) If then the plaintiffs are not entitled to compensation, they must be entitled to maintain this action, otherwise they are left without remedy for a most grievous wrong.

[GROVE, J. That argument, as well as the first proposition put forward by the plaintiffs, is answered by *Vaughan v. Taff Vale Ry. Co.* in this court (4).]

H. Matthews, Q.C. (with him *H. James*, Q.C., and *Jelf*), for the defendants, was not heard.

KELLY, C.B. I am of opinion that the judgment of the Court of Queen's Bench should be affirmed.

45] *The plaintiffs are the owners of the coal mine under a canal of which the defendants are the proprietors, and which they were and still are using under the provisions of several Acts of Parliament.

It is essentially necessary to look at the precise terms of the declaration in order to apply them to the facts of the case, and so to determine the questions submitted to us. The declaration charges that while the plaintiffs were owners of the coal mine the defendants brought large quantities of water into the canal near the mine, and so carelessly and improperly managed the canal and water that the water escaped into and flooded the coal mine, whereby the plaintiffs sustained damage, etc. So that, striking out the charge of negligence, the defendants are charged with nothing but that they brought water into the canal near the plaintiff's mine. The defendants, under their many acts, are possessed of the canal, with full power to use it for the benefit of the public and for the purpose of carrying on the business of a canal in the ordinary way; and they had therefore full power to bring the water where it was brought; and the only question arising in the case is, whether the defendants have been guilty of negligence in the management of the canal; for it would be evidently absurd to treat as a cause of action the

(1) 15 C. B. (N.S.), 726; 33 L. J. (C.P.). (2) Law Rep. 7 Q. B. at pp. 281-3.
198.

(3) Law Rep. 7 Q. B. at p. 246.

(4) 5 H. & N., 679; 29 L. J. (Ex.), 247.

bringing of the water into the canal. The same question is more specifically raised on the special plea, and it is clear that on the facts the plea is strictly proved.

The facts are these. The defendants having constructed their canal many years ago, under the powers of the act of 16 Geo. 3, which is the only act to which it is necessary to refer, the plaintiffs or their predecessors in title had never been minded to work their mine until recently. The plaintiffs, however, being so minded, gave notice, as they were required to do under the act, to the defendants of their intention to work the mine. The defendants might then have inspected the mine, and they had power, if they thought it for their interest to do so, to purchase the mine. They were not, however, obliged to purchase; they might, if they thought fit, abstain from availing themselves of the power in the act of purchasing the mine, and continue to use their canal, carrying on the business of the canal, and taking their chance as to whether any damage might be occasioned to the plaintiffs, they being bound in that event to make compensation in some way or other, either under the compensation clauses in the act, or in an action, as in the present case. The defendants abstained from inspecting or purchasing the mines, and it turns out that the plaintiffs, having proceeded to work their mine, and to excavate under the canal, so weakened the foundation that the water penetrated through the bottom into the mine, and no doubt inflicted on the plaintiffs very considerable damage; and the question is, whether, under the circumstances found in the case, the defendants are liable for that damage in this action.

It has been contended for the plaintiffs in the first place, and authorities were cited for the proposition, that on the facts and under the provisions of this act, in the event of the defendants refusing to purchase, the plaintiffs had a full right to work the mines just as if no act had been passed and no canal constructed. I entirely agree to that proposition, which needed no authority to support it, that the plaintiffs were entitled to work their mine, and the canal company had no remedy for any damage that might ensue to the canal, they being only entitled to the surface of the land. I agree that the plaintiffs have done no more than they were entitled to do, and that no action could be maintained by the defendants against them; but the question here is whether, the water having penetrated through the bed of the canal into the mine, the plaintiffs can maintain this action against the defendants for the damage done.

The defence of the company is, that this is an action for negligence, and that the action cannot be maintained except on proof of negligence, which is expressly negatived by the case;

and looking at the declaration, I think that is clear — that the action cannot be maintained, the negligence being negatived, inasmuch as it was not an unlawful act to bring the water into the canal, as the defendants had the absolute power to construct the canal and keep it filled with water under their act. Consequently I agree that the defendants would be entitled to judgment; but as Hannen, J., dissented from the majority of the Court of Queen's Bench, and various other propositions have been put forward on the part of the plaintiffs, and authorities cited in support of them, I think it so far necessary to consider those arguments as to show that, in any point of view, the plaintiffs cannot maintain this action.

It was contended that, if this action could not be maintained, the plaintiffs would be without remedy, as the compensation clauses were not applicable. If that were so, then no doubt the legislature have inflicted a grievous injustice upon the proprietors of mines. But still, under the authority of the case ⁽¹⁾ to which reference has been made, if the canal company have done no more than the legislature have authorized them to do, and damage results, and although there may be no clauses in the act affording compensation, no action can be maintained.

But I feel bound to say, speaking only for myself, that I entertain no manner of doubt that, upon the clauses in this act, the plaintiffs would be entitled to compensation for the injury sustained by them by reason of the canal company having carried on the business of a canal, in other words, having exercised the powers of the act, although lawfully. I will refer first to page 1592 of the act ⁽²⁾, which seems to be clear and decisive on the subject. After authorizing the company to construct the canal and carry on the business of a canal in the usual way, so as to make it available for the public, the act proceeds: "doing as little damage as may be in the execution of the powers granted to them, and making satisfaction, in manner hereinafter mentioned, for all damages to be sustained by the owners of such lands, tenements, or hereditaments respectively, as shall be taken or prejudiced in or by the execution of all or any of the powers of this act." It is by the execution of the powers of the act, that is, by bringing water into the canal, and keeping it there, that the plaintiffs' mine, which is an hereditament within the meaning of the act, is prejudiced in the manner stated in the case. Therefore it seems to me that, upon this clause, it is perfectly clear that the plaintiffs are entitled to compensation for the damage caused by this lawful exercise of the powers of the act. If any doubt existed, I think,

⁽¹⁾ *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N., 679; 29 L. J. (Ex.), 247.

⁽²⁾ See Law Rep., 7 Q. B. at p. 246.

it would be at once removed by the clause at p. 1603 ⁽¹⁾, which empowers the commissioners "to determine and adjust what distinct sum of money shall be paid by the company, as a recompense *for any damages which may be at any time or [48 times whatsoever sustained by such bodies politic, &c., or other person or persons, respectively, being owners of or interested in any lands, grounds, tenements, or hereditaments, for or by reason of the making, repairing, or maintaining the said canal, . . or by reason of the execution of any of the powers herein contained by the company." I think, under the provisions of the act, it is obvious that, where damage has been sustained by owners of any hereditament, which a coal mine is, by reason of the execution of the powers of the act, that is to say, in maintaining and managing the canal, in other words, keeping the canal full of water, without which there could be no navigation, that is a matter for compensation. But I have looked in vain for any ground for the proposition of the plaintiff's counsel, even if the compensation clauses do not apply, that this action can be maintained for damage caused by the lawful exercise of the powers of the act, which the keeping the canal filled with water beyond all question is.

Reference has been made to the judgment of Hannen, J. He seems to have held that the company were liable to this action by reason of their having failed to do something which they were bound to do, and which if done would have prevented the damage. Mr. Huddleston, as far as I understood him, said there was negligence. First, the defendants might have purchased the mine. It is clear under the act, that though they had the option of purchasing after notice of intention to work the mine, they were not bound to do so, and therefore there can be no negligence in not having purchased. It was for them to consider what was best for their own interest, seeing they are liable to pay compensation, if, by lawfully exercising the power of the act, they inflict damage on persons whose property may be near.

Then it was argued that the defendants might have prevented the damage by drawing off the water; and it was said that, because they had done so for some time for their own purposes, that showed that they might and ought to have done so, if they did not choose to purchase. But they had a right, and the very object of their act was, to keep the navigation open; and to say that there was an obligation upon them in a given event to draw off the water, is to say that they were bound under the act to render *their canal useless. The proposition is al- [49 most self-evidently untenable.

(1) See Law Rep. 7 Q. B. at p. 246.

Then the question has been raised whether the charge of negligence is absolutely negatived in the case. On looking at the case from par. 19, to the end, though the case is lengthened out, and the statements are not in the most perspicuous form, it appears that the defendants had managed their canal properly, and had been guilty of no negligence, unless it was negligence to keep the water in the canal; and this I have already disposed of.

In whatever point of view, therefore, the case is considered, whether in substance or as to the particular form of the declaration and the plea, it appears that the defendants have done no more than the act authorized them to do; and having lawfully exercised their powers, they are protected from any action whatever for the consequences of their acts.

I think, therefore, the judgment must be affirmed.

BRAMWELL, B. I am of opinion that the judgment should be affirmed. It seems to me that my Brother Mellor put the question upon its true footing. He says (*), "No action at law will lie unless there be a legal injury and resulting damage. Now what is the 'injuria' here? Is it the declining to purchase the mines after notice? The defendants were under no other obligation to do so than such as might result from a sense of their own interest. Is there any obligation or duty to be implied which they have not fulfilled? The only obligation upon them must be found, directly or by necessary implication, in the language of the statute; and as it appears to me, they have fulfilled every obligation imposed upon them by it." He says a great deal more, very pertinent and valuable, but which it is not necessary to quote now. Is not what I have read true? and can any answer be given, as to what the "injuria" is, unfavorable to the defendants? The injuria is certainly not in making the canal, and having the water in it, because that they have a right to do; that was no injuria. What is it that they have done or failed to do which is wrongful on their part? Hannen, J., seems to think that there are two possible cases, or rather the alternative of two cases. He says 50] (*), "Upon *the facts stated in the special case, I think it appears that the drowning of the plaintiffs' mines was not the necessary consequence of the execution of the powers of the act, but might have been prevented by the defendants. This mischief might have been prevented in one of two ways: either by purchasing the mines"—that is to say, they might have avoided drowning these mines by preventing them being the plaintiffs' mines, there is no doubt about that; but they were

(*) Law Rep. 7 Q. B., at p. 273.

(*) Law Rep., 7 Q. B., at p. 281.

under no obligation to prevent them from being the plaintiffs' mines—"or by drawing off the water,"—which is equivalent to not having the canal there at all. It seems to me that those are two things which they were under no obligation to do; there was no injuria in their not purchasing the mines, and no injuria in having the water. It appears to me, therefore, there is no injuria in this case, and the action is not maintainable.

There is another way of putting it. I do not like special pleading tests, if they be purely special pleading tests, but looking at the declaration and pleadings as a logical test, I would ask whether they are not demonstrative that the plaintiffs are not entitled to recover? The plaintiffs say the defendants brought water into the canal near to the coal mine. To that the defendants say, "We admit we did bring it there, but we had a right to do so under the Act of Parliament." That part of the plea is proved and is true. Then the declaration goes on to state, "and so carelessly and improperly kept and managed the said water and canal that the water escaped;" that is negatived upon the facts found by the arbitrator. He states that they did not do it carelessly or negligently. If this were a question of mere statement it would be for us to amend it, if necessary, but in my opinion, this could not be amended. The plaintiffs have properly, truly, and logically stated their case; first of all they say the water was there and they had a right to complain; and if the defendants had power to bring it there under the Act of Parliament, then they say, "you managed it improperly," and that the defendants deny and disprove. It seems to me to be almost demonstrated, when one looks at the pleadings, so concisely putting the case on the one side and the other, that the defendants are entitled to our judgment.

Whether or not the plaintiffs are entitled to anything under the *compensation clauses, is not a matter that, in one [51] sense, properly arises here. The fact, however, that they are so entitled, certainly would go to make the construction of the Act of Parliament or the conclusions at which we arrive more probable. If there is no compensation in the act, then there is a *damnum absque injuriâ* by authority of the legislature, as in the case mentioned by my brother Grove, of *Vaughan v. Taff Val Ry. Co.* (1).

I cannot agree with the reasoning of Hannen, J., where he says, for the purpose of showing that this is not a case for compensation, but for action: "It was, therefore, a wrongful act on their part to keep the water in the canal without having taken the means in their power, by the expenditure of a certain sum of money, to prevent the mischief which has happened. The

(1) 5 H. & N. 679; 29 L. J., (Ex.) 247.

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Dunn v. Birmingham Canal Co.

defendants knew, or ought to have known, that the probable result of working the mines would be to let the water through" (1). The legislature knew that probably the result of the canal being there, or the possible and not unnatural result, would be that water would get through, and they have certainly in other cases, if not in this, provided for compensation. I may here repeat the remark that I made, that if there has been any wrongful act here in the defendants, or wrongful omission, they might have been restrained or compelled by injunction, and I should like to know how it would have been possible for an injunction to have ordered or compelled the defendants to do anything that they have not done.

It seems to me that the defendants are entitled to our judgment.

CHANNELL, B. I agree with my lord chief baron and my brother Bramwell in affirming the judgment of the Court of Queen's Bench. I think that this action is not maintainable. Some other matters have been adverted to in the course of the argument, as to which I think it is unnecessary to give any opinion.

KEATING, J. I also agree that the judgment should be affirmed and that this action is not maintainable. The only possible view put forward by Mr. Huddleston under which this action could be maintained was, that under this Act of Parliament the refusal of the defendants to purchase the plaintiffs' mine im-52] posed upon them *an obligation in all events to secure the water of the canal from getting into the plaintiffs' mine if they worked it. If that were so, it might be well urged that a duty was created, and a breach of duty took place, and that the case was brought within the authority of the case of *Fletcher v. Rylands*. (2) But I can discover no such duty resulting from this Act of Parliament, and if there was none, it is necessary to prove there was negligence, or, at least, improper or careless management, on the part of the defendants. But it is distinctly negatived by the case that there was any such careless or improper management of the canal.

With regard to the compensation, I agree that it is not necessary to decide the point. When I say that, I must not be supposed as casting the slightest doubt upon the opinion expressed by my lord chief baron; indeed, I would go on to say that if compensation cannot be given a gross injustice will have been perpetrated; but that will be, as my lord observed, by the authority of the legislature. I should hope, therefore, that the construction which my lord chief baron has put upon the statute

(1) See Law Rep., 7 Q. B., at p. 281. (2) Law Rep., 8 H. L., 880.

would be the construction ultimately to be adopted ; and I have no doubt the courts would take every means to give the fullest effect to the words in the statute, in order to give the compensation to which the plaintiffs are certainly in point of justice entitled.

PICOTT, B. I agree that the judgment should be affirmed, and I do so upon the short ground that the defendants have only done what they have done under the powers of the Act of Parliament. They have done nothing negligently, but have confined themselves strictly to the powers conferred upon them by the statute. When we have to consider the question as to whether an action will lie, I cannot agree with the judgment of HANNEN, J., upon that point. I think we are bound to find out, in order to determine whether the action lies, whether the plaintiffs are entitled to compensation in one of two ways. I think it clear that they are entitled to compensation under the clauses which have been referred to ; but it is sufficient to say that it is clear that they are not entitled to recover damages by action. No authority is to be found during all the time that canals have existed ; and although many actions have *been brought by [53 canal proprietors against coal owners, no actions have been brought by coal owners against canal proprietors. I am therefore of opinion that under the powers of this Act of Parliament no such action as the present is maintainable.

GROVE, J. I am of the same opinion. As to the question of compensation, I may observe that in the preamble of the act it is stated that the making of the canal will be of particular advantage to the owners of collieries and other mines, and so on. I do not say that this is the reason, but this may have been the reason prevailing in the minds of the legislature why the mine owners should take some slight contingent risk upon themselves. Therefore I do not see that necessarily an injustice will be done if there be not compensation, because it may be that the legislature thought the mine owners would have sufficient compensation by the making of the canal. It is quite unnecessary, however, to express an opinion upon that point, because I am of opinion upon the other grounds that the action is not maintainable.

DENMAN, J. I am of the same opinion. I have nothing to add to the judgment of my brother Bramwell, in which I entirely concur.

Judgment affirmed.

Attorney for Plaintiffs : *Warmington, for Warmington, Dudley.*

Attorneys for Defendants : *Tucker & Lake, for Ingleby, Wragge, & Evans, Birmingham.*

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McCawley v. Furness Railway Co.

[Law Reports, 8 Queen's Bench, 57.]

Nov. 15, 1872.

57] *McCawley v. THE FURNESS RAILWAY COMPANY.

Railway Company — Cartier of Passengers — Passenger travelling "at his own risk" — "Willful and gross Negligence."

Declaration, that plaintiff was a passenger by defendants' railway, and they so negligently conducted themselves in the management of their railway that an engine and tender came into collision with the train in which plaintiff was travelling, and he was injured thereby. Plea, that defendants received plaintiff to be carried under a free pass as the drover accompanying cattle, one of the terms of which was that plaintiff should travel at his own risk. Replication, that it was by reason of the gross and willful negligence of defendants that the accident happened. On demurrer:

Held, that the replication was bad; for that, whatever gross or willful negligence might mean, plaintiff, by the terms on the pass, had agreed that defendants should not be liable for the consequences of any accident happening in the course of the journey for which they would otherwise have been liable.

DECLARATION: That plaintiff was received by defendants as a passenger to be by them safely and securely carried upon their
58] *railway on a journey from Piel Pier to Carlisle, for reward to defendants, yet defendants did not safely and securely carry plaintiff upon the said railway on the said journey, and so negligently and unskillfully conducted themselves in relation thereto, and in managing the railway and the traffic thereon, that an engine and tender ran into and came into collision with the train in which plaintiff was, and plaintiff was thereby greatly injured.

Plea, that defendants received plaintiff to be carried under a free pass from Piel Pier to Carlisle, as a drover accompanying cattle which defendants had contracted to carry, under an agreement whereby it was, amongst other things, provided that any drover accompanying cattle during the transit from Piel Pier to Carlisle should travel at his own risk.

Replication, that it was by reason of gross and willful negligence and mismanagement of defendants in relation to the matters in the declaration mentioned that the alleged grievances were committed by defendants.

Demurrer and joinder.

Crompton, in support of the demurrer. The plea is a good answer to the declaration; and the replication is bad. The plaintiff was to be carried at his own risk, which is equivalent to saying that the defendants were not to be liable for any accident, however caused; and in *Curr v. Lancashire and Yorkshire Ry. Co.* ⁽¹⁾ and *Austin v. Manchester, &c., Ry. Co.* ⁽²⁾ this was held

⁽¹⁾ 7 Ex., 707; 21 L. J. (Ex.), 261.

⁽²⁾ 10 C. B., 454; 21 L. J. (C.P.), 179.

to exclude liability even for gross negligence. In *Hinton v. Dibbin* ⁽¹⁾ it was held that the Carriers Act, which says that carriers shall not be liable for loss of certain goods unless their nature is declared, protected a carrier, although the loss was caused by his gross negligence and willful default.

Butt, Q.C. (*Murphy* with him), for the plaintiff. "At his own risk" can only be intended to apply to the ordinary risks of a traveller, and cannot be extended to accidents caused by gross or willful negligence, such, for instance, as if the company were knowingly to use an unsafe carriage. In *Phillips v. Clark* ⁽²⁾ a *clause in a bill of lading, that the shipowner should [59 not be liable for leakage or breakage, was held not to exclude liability where the breakage was caused by negligent stowing.

[BLACKBURN, J. In *McManus v. Lancashire and Yorkshire Ry. Co.* ⁽³⁾ it was held that a condition that the owner should undertake all risk of conveyance was unreasonable, because it protected the company from the consequences of injury, though caused by their own misconduct. This is a decision directly in favor of the defendants upon the construction of this agreement.]

Crompton was not heard in reply.

COCKBURN, C.J. I think that the plea is good, and the replication bad. The terms of the agreement under which the plaintiff became a passenger exclude everything for which the company would have been otherwise liable. They would have been liable for nothing but negligence, and they would have been liable for negligence whether gross or of a minor degree; and so far, under ordinary circumstances, the passenger would have been carried at their risk. But it was agreed that the plaintiff should be carried at his own risk, which must be taken to exclude all liability on the part of the company for any negligence for which they would otherwise have been liable.

BLACKBURN, J. I am of the same opinion. The duty of a carrier of passengers is to take reasonable care of a passenger, so as not to expose him to danger, and if they negligently expose him to danger, and he is killed, they might be guilty of manslaughter, and they would certainly be liable to the relatives of the deceased in damages. But here the passenger was carried under special terms; that agreement would not take away any liability that might be incurred as to criminal proceedings, but it regulates the right of the plaintiff to recover damages. The plea states that it was agreed that the plaintiff, being a drover travelling with cattle, should travel at his own risk; that is, he takes his chance, and, as far as having a right to re-

⁽¹⁾ 2 Q. B., 646.

⁽²⁾ 2 C. B. (N.S.), 156; 26 L. J. (C.P.), 168.

⁽³⁾ 4 H. & N., 327; 28 L. J. (Ex.), 353.

cover damages, he shall not bring an action against the company for anything that may happen in the course of the carriage. It 60] would of course be quite a different thing were an action brought for an independent wrong, such as an assault, or false imprisonment. Negligence in almost all instances would be the act of the company's servants, and "at his own risk" would of course exclude that, and gross negligence would be within the terms of the agreement; as to willful, I am at a loss to say what that means; but any negligence for which the company would be liable (confined, as I have said, to the journey, and it is so confined by the declaration) is excluded by the agreement.

MELLOR, J. I am of the same opinion. The plaintiff became a passenger on unusual terms; the company agreed to allow him to travel under a free pass on the terms that he travelled at his own risk. That clearly exempts the company from all liability for the consequence of any accidents occurring in the course of the journey; and I cannot see how the declaration is to be explained or extended by the replication. As to willful negligence, like my brother Blackburn, I am at a loss to say what that means; but the effect of the agreement set out in the plea is to exempt the company from liability for all negligence.

QUAIN, J. The declaration is founded, as it must be, on the negligence of the company by their servants; for a carrier of passengers is not, like a carrier of goods, an insurer. But the agreement under which the plaintiff became a passenger amounted to saying that the defendants should not be liable, as they otherwise would be, for the consequences of an accident caused by their negligence. The question then is whether the replication takes the case out of the contract. I think it clearly does not. Negligence, even gross, is the very thing which the contract stipulates that the defendants shall not be liable for; and "willful" cannot carry the case any further, especially as the company would not be liable for a willful act of commission by a servant, though they would be for his gross negligence.

Judgment for the defendants.

Attorneys for plaintiff: *Grey, Johnston & Mounsey.*

Attorneys for defendants: *Sharp & Ullithorne.*

The mere fact that a passenger is riding upon a free pass does not exempt a rail road from liability for an injury sustained by him through the negligence of the employees of the company. *Perkins v. N. Y. Cent. R. R.*, 24 N. Y., 196; *Wilton v. Middlesex R. R.*, 107 Mass., 108; *Shearf & Red.*, on Neg., §§ 263, 264; 2 Redfield on Railways (5th ed.), pp. 225-228.

But if the passenger, in consideration of an abatement of the fare or a free pass, voluntarily assume the risk of accident the company is not liable. *Bisell v. N. Y. Cent. R. R.*, 25 N. Y., 449; *Contra, Cleveland, etc. v. Curran*, 19 Ohio St. R., 1; *Pennsylvania, etc., v. Henderson*, 51 Penn. St. R., 315.

Though the passenger have not entered the car but be injured while on

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the way thereto. *Poucher v. N. Y. Cent. R. R.*, 49 N. Y., 268.

But a mere notice, without the assent of the passenger is no defence. *Rauson*

v. Pennsylvania, etc., 2 Abb., N.S., 228-4; *Bissell v. N. Y. Cent. R. R.*, 26 N. Y., 445; *Perkins v. N. Y. Cent. R. R.*, 24 N. Y., 201.

[Law Reports, 8 Queen's Bench, 65].

Nov. 9, 1872.

*FOULGER, Appellant; STEADMAN, Respondent. [65]

Jurisdiction of Justices — Premises connected with Railway — Willful Trespass — 8 & 4 Vict. c. 97, s. 16.

A railway company were possessed of a thoroughfare which had the appearance of a public street. The company allowed certain cabs to stand in the thoroughfare upon payment of a weekly sum by the drivers. The respondent, not being one of the drivers who paid, stood his cab in the thoroughfare, and refused to leave when requested on behalf of the company to do so:

Held, that the respondent was a willful trespasser within 8 & 4 Vict. c. 97, s. 16.

CASE stated by one of the aldermen of the city of London under 20 & 21 Vict. c. 43.

*Information, under s. 16 of 8 & 4 Vict. c. 97⁽¹⁾, preferred [66] by the appellant, the inspector of the police of the Great Eastern Railway Company, charging that the respondent unlawfully and willfully did trespass upon certain premises connected with the Fenchurch street station of the railway, to wit, Railway Place, and did refuse to quit the same upon request.

It was proved that the respondent drove a cab into Railway Place, the ownership of which is in the company, and which is not a cul-de-sac, but presents the appearance of a public street, and through which foot passengers and carriages are allowed by the railway company to pass. The company allowed the sides of Railway Place, next to the curb of the footway, to be

⁽¹⁾ 8 & 4 Vict. c. 97, s. 16. "If any person shall willfully obstruct or impede any officer or agent of any railway company in the execution of his duty upon any railway or upon or in any of the stations or other works or premises connected therewith, or if any person shall willfully trespass upon any railway or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the said company, every such person so offending, and all others aiding or assisting therein, shall and may be seized and detained by any such officer or agent, or any person whom he may call to his assistance, until

such offender or offenders can be conveniently taken before some justice of the peace for the county or place wherein such offence shall be committed, and when convicted before such justice as aforesaid (who is hereby authorized and required, upon complaint to him upon oath, to take cognizance thereof, and to act summarily in the premises) shall in the discretion of such justice forfeit any sum not exceeding five pounds, and in default of payment thereof shall or may be imprisoned for any term not exceeding two calendar months, such imprisonment to be determined on payment of the amount of the penalty."

occupied as cabstands by cabs, the drivers of which paid to the company a weekly sum for that privilege. About forty cab drivers, of whom the respondent was not one, made that payment. The respondent refused to leave the stand when requested to do so on behalf of the company.

It was contended on behalf of the respondent, that Railway Place was a public thoroughfare, and that he was not a willful trespasser.

Upon these facts the alderman was of opinion that the respondent was not willfully trespassing.

67] *The question for the court was whether the respondent ought to have been convicted.

April 22. *H. S. Giffard*, Q.C. (*Marriot* with him) for the appellant. It is conceded that if there was evidence of a *bonâ fide* claim which might be sustained at law, the justice would have been right in dismissing the summons; but the respondent came on the ground of the railway company against their consent. He thereby willfully committed a trespass, for, upon the facts found, there was no evidence of any right in the respondent as one of the public to put his cab upon the stand; and it is no defence to the charge that he fancied that, as one of the public, he had such a right. The fact that he was *bonâ fide* mistaken does not do away with his liability to be convicted.

J. Brown, Q.C., for the respondent. The respondent is charged with a criminal offence. Sect. 16 imposes a penalty, or in default, imprisonment on the offender. There can be no criminal offence, unless there be *mens rea*. The respondent went on the railway premises to exercise a right; the trespass therefore was not in a criminal sense willful. *Jones v. Taylor* ⁽¹⁾ is in point; in that case complaint was made against Taylor under this section for willfully trespassing on the premises of a railway company, and refusing to quit upon request. The facts were, that Taylor, having a contract with a third person, whose carriage was in the company's premises, to repair it, although he had been prohibited from entering the premises, went there for that purpose, and refused to quit on request. The magistrates refused to convict, and Lord Campbell, C.J., said, "If Taylor was a trespasser, the magistrates were not bound to find that he was a willful trespasser." According to that case the alderman's decision is correct.

[BLACKBURN, J. *Jones v. Taylor* ⁽¹⁾ appears to have been little considered. The judgment is very meagre.]

To constitute an offence under s. 16, there must be an intent to commit a wrongful act: *Reg. v. Bent* ⁽²⁾.

⁽¹⁾ 1 E. & E., 20.

⁽²⁾ 1 Den., C. C., 157.

[HANNEN, J. Is not the trespass willful if the person who commits it acts under a mistake as to what the law is?]

H. S. Giffard, Q.C., in reply. A guilty mind is not a necessary *ingredient to constitute an offence under s. 16. The [68 jurisdiction of the alderman was] not ousted by the *bonâ fide* claim of a right which could not exist in law: *Hudson v. M' Rae* ⁽¹⁾.

[BLACKBURN, J. I think this case must be decided in favor of appellant. Notwithstanding *Jones v. Taylor* ⁽²⁾, we think if a man does intentionally and purposely stay on the railway premises after being requested to leave, he commits a willful trespass within s. 16 of 3 & 4 Vict. c. 97, although he fancies that he is entitled to remain upon the premises because other drivers are allowed to put their cabs upon the stand, pursuant to certain terms. If there had been a *bonâ fide* claim of a right, which upon the evidence adduced could exist in law, the alderman would have been bound to hold his hand; but here the defence only amounted to this, that the respondent believed he had a right to stand his cab upon ground which was the premises of the company without their leave. This belief does not prevent the respondent from being a willful trespasser.

HANNEN and QUAIN, JJ., concurred.

Case remitted accordingly. ⁽³⁾

Attorney for appellant: *W. H. Shaw*.

Attorneys for respondent: *Lewis & Lewis*.

⁽¹⁾ 4 B. & S., 585; 33 L. J. (M.C.), 65.

⁽²⁾ 1 E. & E., 20.

⁽³⁾ The case stood over to ascertain whether the place was "premises connected with the railway;" and this

being found in the affirmative, judgment was given for the appellant on November 9. See *White v. Feast*, Law Rep., 7 Q. B., 353.

See *Reg v. Ward*, 1 Eng. Rep., 403 and note, 408. Malice, in its legal sense, means a wrongful act done in-

tentionally without just cause or excuse. *The State v. Schoenwald* 81 Missouri, 147.

C A S E S

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXVI VICTORIA.

[Law Reports, 8 Queen's Bench, 77]

Jan. 17, 1878.

77]

*MILES v. FURBER and others.

Landlord and Tenant — Distress for Rent — Privileged Goods — Goods deposited at a Depository Warehouse to be taken care of — Estoppel.

The plaintiff deposited household furniture at a depository to be warehoused at the rate of 30s. a year. At the time he thought he was depositing them with a company with whom he had had dealings before; and he received a receipt in the name of the company, which name was also over the door of the depository. The fact was that the company had sold their business to B., and let the premises to him, but they had authorized the use of their name. B. being in arrears for rent, the defendants seized and sold the plaintiff's goods under a warrant of distress from two of the directors of the company; on which plaintiff brought an action against defendants:

Held, that the case fell within the principle of *Swire v. Leach* (18 C. B. (N. S.) 479; 34 L. J. (C. P.) 150); and that the goods were privileged from distress, as things delivered to a person exercising a public trade to be managed in the way of his trade.

Held also, that the company were estopped from distraining as landlords by having allowed themselves to be held out as the persons with whom the goods were deposited.

Case stated under an order of *Nisi Prius*.

Declaration for seizing and converting goods of plaintiff.

78] *Plea; not guilty by statute (11 Geo. 2, c. 19, ss. 19 and 20) justifying under a distress for rent.

Issue joined.

1. The plaintiff on the 20th of October, 1869, deposited various articles of household furniture at a depository for furniture, sit-

uate at 277 Gray's Inn Road, London, and received the following receipt: "London Depository Company Limited, Gray's Inn Road, King's Cross, Oct. 20th, 1869.

" Received from Mr. Miles, furniture and goods as per inventory No. 134, terms 30s. per year. To be warehoused subject to the conditions endorsed thereon. For the London Depository, Company Limited. J. L. FOSTER, for Manager."

2. Before the month of May, 1863, one Stuckley was the occupier of the premises 277 Gray's Inn Road, and used them as a depository for furniture under the name of the North London Depository.

3. In May, 1863, a joint stock company was formed for the purpose of purchasing and did afterwards purchase Stuckley's interest in the premises, and the good will of his business, and the company was incorporated under the name of the London General Depository Company Limited. The registered office of the company was painted conspicuously on the premises. The company carried on the business until July 1866.

4 & 5. In the year 1865, a Mr. Beeston, who had previously acted as secretary of the company, entered into negotiations for a lease of the premises 277 Gray's Inn Road, from the company, and a transfer of their business, and his proposal was submitted to the shareholders. It was found upon examining the articles of association that the company had no power to transfer the premises or the business, and in order to get over the difficulty, it was agreed among the shareholders that the company should be dissolved, and a new company to be called "The London Depository Company, Limited," should be formed with articles of association containing the necessary powers.

6-8. The new company was incorporated in July 1866, and the old company was shortly afterwards dissolved. The new company carried on the business until the arrangements with Beeston were completed in April, 1867. Their name was painted conspicuously upon the premises 277 Gray's Inn Road, [79 where the name of the old company had previously appeared. In April, 1867, the arrangements with Beeston were carried out by two deeds of the 8th of April, 1867. By one deed the company granted an underlease of the premises 277 Gray's Inn Road, to Beeston for sixty years, at a yearly rent, payable quarterly. By the other deed the company assigned to Beeston all their goodwill in the business, with full power and liberty to Beeston to carry on the business in the name of the company, and further transferred to him all their book debts, and all their subsisting contracts, and all other the property in and about the premises, and used by them in carrying on their business. The deed contained a covenant from Beeston to indemnify the

company from all claims and demands arising from the business being carried on in the company's name.

9. After the 8th of April, 1867, the London Depository Company, Limited, ceased to carry on the business, and the same was carried on for his own benefit by Beeston. The company, however, had their registered office at 277 Gray's Inn Road, and their name continued upon the premises down to about the month of July 1869. Meetings of the directors were from time to time held at their registered office.

10 & 11. In July, 1869, Beeston went into partnership with a man named Robinson, a coachbuilder, and the business was carried on upon part of the premises, 277 Gray's Inn Road. A large number of carriages was placed on the premises for sale. The business of a furniture depository continued to be carried on as before. When this new partnership was formed Beeston took down the board on which the name of the company had been painted, and painted on the front of the building the name, "The London Carriage Bazaar." Shortly after, the directors of the company discovered that the name of the company had been removed, and being afraid of incurring penalties if their title did not appear at their registered office, required Beeston to replace it. Beeston had the name of the company painted over one of the doorways where it was clearly visible, though it was not conspicuous.

12. When the plaintiff deposited the goods at 277 Gray's Inn Road, in October, 1869, and obtained the receipt mentioned in paragraph 1, he was not aware either that a new company had [80] *been formed, or that Beeston was their tenant, or that the business was being carried on by Beeston. He believed that he was dealing with the company which had been formed in 1863, with which he had had previous transactions; and his attention was not called to the alteration in the name by the omission of the "General." Foster who signed the deposit receipt was a servant of Beeston's, and was not in the employ of the company. The company at the time when the receipt was given had no manager.

13. The goods deposited by the plaintiff were placed in a separate room or compartment, on which was fixed a label bearing the plaintiff's name, and so remained until they were removed and sold by the defendants under the distress for rent.

14 & 15. On the 7th of January, 1870, the sum of 1400*l.* for rent was due from Beeston to the company, and at a meeting of the directors of the company, held on the 8th of February, 1870, it was resolved that a distress should be levied upon the goods on the premises for the arrears, and accordingly a distress warrant was issued signed by two of the directors. The war-

rant was placed in the hands of the defendants, who accordingly distrained upon all the goods on the premises, and afterwards sold the plaintiff's goods.

16. It is agreed that the court shall be at liberty to draw any inferences, or find any facts which in the opinion of the court a jury ought to have drawn or found.

The question for the court was whether the defendants are liable in this action.

Joyce, for the plaintiff. First, the plaintiff's goods, being deposited in a warehouse kept for the purpose, were not distrainable, within the principle of the cases of *Swire v. Leach* ⁽¹⁾ and *Adams v. Grane* ⁽²⁾, in which goods pledged with a pawnbroker, and goods deposited with an auctioneer for sale were held not distrainable, as things delivered to a person exercising a public trade to be managed in the way of his trade. Erle, C.J., in the former case classes the pawnbroker with the wharfinger, and a warehouseman is still nearer.

[MELLOR, J. On the other hand, a horse and carriage standing at livery have been held not privileged from distress.]

*Secondly, even if the goods were not privileged, the [8] company were estopped from distraining as landlords, having held themselves out as the persons with whom the goods were deposited.

H. James, Q.C. (*Francis* with him), for the defendants, was directed by the court to argue the first point. These goods were not within any of the exemptions from the general rule that goods found on the premises are liable to be distrained: *Parsons v. Gingell* ⁽³⁾ is the case to which Mellor, J., referred, as deciding that a horse at livery was distrainable. In that case Wilde, C.J., says: "The question in all these cases is whether the goods are placed in the hands of the tenant merely with the intent that they shall remain upon the premises, or with the view of having labor or skill bestowed upon them; which is the principal object, and which incidental? If the goods are sent to the premises for the purpose of being dealt with in the way of the party's trade and are to remain upon the premises until that purpose is answered, and no longer, the case falls within one class; but if they are sent for the purpose of remaining there merely at the will of the owner, there being no work to be done upon them, it falls within a totally distinct consideration."

The chief justice, after saying that the question was under which class a horse at livery falls, proceeds: "The general principle of law undoubtedly is, that all goods found upon the

(1) 18 C. B. (N.S.), 479; 34 L. J. (C.P.), 150.

(2) 1 Cr. & M., 180.

(3) 4 C. B., 545, 558; 16 L. J. (C. P.) 227.

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premises are liable to be distrained for rent. Upon that general rule two exceptions only are engrafted. The first is, when the article is sent for the sole purpose of having the labor or skill of the artisan performed upon it, and it is to be returned to the owner as soon as that purpose has been accomplished." He then gives instances of the horse sent to the farrier, clothes to the tailor: "The second exception is, where the goods are sent to the party's premises in the way of his trade, for the purpose of sale. It appears to me that all the cases cited, that profess to range themselves under this head, strictly do so. Upon what precise ground the privilege of goods at a wharfinger's rests does not very distinctly appear. I incline to think it arose from the circumstances of there having in former times existed only certain wharves, at which all persons were obliged [82] to land their *goods, and at which it does not appear that goods were landed for any other purpose than that of sale." It appears from this case, therefore, that the only privileged goods are goods left to have labor bestowed upon them, or for the purpose of sale.

[COCKBURN, C.J. That is inconsistent with the later case in the same court, which I prefer to follow, and the present case appears to come within the principle of that decision.]

Swire v. Leach (1) carries the principle of exemption from distress far beyond the previous cases. Thus cattle taken into agist have been held not privileged.

On the second point it is difficult to say that the defendants are not estopped by their conduct.

COCKBURN, C. J. The principle which is applicable to a pawnbroker's business seems to me to be applicable to this case; if the goods deposited were liable to be distrained, it would affect the very existence of the business. I am inclined to think that the case of horses and carriage at livery must be taken as trenching upon this principle. At all events, if the two cases in the Court of Common Pleas are not reconcilable, I prefer to abide by the latter case, *Swire v. Leach* (1), the principle of which, as I have already said, seems precisely applicable to the present case. I also think that the company were estopped, they having allowed themselves to be held out as the persons with whom the goods were deposited.

MELLOR, J. I am of the same opinion. When goods are received in the course of a particular trade, to be dealt with in accordance with that trade by a tenant of premises, there are cases to show that the landlord cannot distrain upon the goods. Though there are cases somewhat to the contrary, such as that

of a horse and carriage at livery. Whether or not any distinction can be drawn between that case and the case of a pawnbroker, we have a later case in the same court as an authority that pledges are privileged from distress, and the same principle applies here. There is also the old case in which it is said that cattle taken in to *agist are distrainable (¹). I cannot help [83 thinking that if it were shown that a person exercised the trade of agisting cattle, the same principle would apply as in the case of a pawnbroker. I also think, on the other ground, that the plaintiff is entitled to judgment.

ARCHIBALD, J. The principle, on which exceptions in the case of certain trades have been engrafted on the general liability of goods to be distrained for rent when found on the demised premises, appears to be, that the trade or business could not be carried on, except the goods were privileged from distress. Thus, goods left with a carrier to be carried or pledged with a pawnbroker are privileged; and goods which are received to be taken care of and warehoused seem to come entirely within the same principle. The law of distress by which one man's goods are made to pay for another man's debts, is not one which should be carried beyond the limits to which it has already been confined; and I think we ought to give effect to the principle of the decision in *Swire v. Leach* (²).

Judgment for the plaintiff.

Attorney for plaintiff: J. Jones.

Attorneys for defendants: Monckton & Co.

(¹) See Rolle Ab. Distress (I), pl. 22, 23; translated in Viner Ab. under the same title, &c. See also *Fowkes v. Joyce* (2 Vent. 50; 3 Lev. 260; and 2 Vern. 129.) (²) 18 C. B. (N.S.), 479; 34 L. J. (C.P.), 150. See also the judgments in *Thompson v. Mashiter* (1 Bing., 286).

[Law Reports, 8 Queen's Bench, 88]

Jan. 25, 1873.

*STEWART and others v. THE WEST INDIA AND PACIFIC [88 STEAMSHIP COMPANY.

Ship and Shipping — General Average — Loss to Cargo by Water let into Ship to extinguish Fire — Custom — Bill of Lading.

Plaintiff shipped bark on board defendants' general ship, under a bill of lading, from Santa Martha to London, by which average, if any, was to be adjusted according to British custom. When the ship was about to sail a fire broke out in the forehold, and pumping water through the deck of the fore-castle not being sufficient to extinguish the fire, a hole was cut in the side of the ship, and, her fore compartment being thereby filled with water, the fire was extinguished. If

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this course had not been adopted the cargo on board would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. The plaintiff's bark was destroyed by the water poured into the ship.

In an action for general average contribution in respect of the destruction of the plaintiff's bark, it was found, in addition to the above facts, that it is the practice of British average adjusters to treat a loss so caused as not a general average loss:

Held, that the loss was, according to the general law of England, the subject of general average contribution, as a voluntary and intentional sacrifice of the bark made under pressure of imminent danger, and for the benefit and with the view to secure the safety of the whole adventure then at risk.

But, secondly, that the plaintiff, by the terms of the bill of lading, had made the admitted practice of British average adjusters part of the contract; and he was bound by it, although erroneous.

Case stated without pleadings.

1. The action was brought in respect of the loss of bark shipped on board the defendants' steamship *Venezuelan*, and consigned to the plaintiffs.

2. The *Venezuelan* came to an anchor in the port of Santa Martha on the 16th of October, 1871; and after discharging all her cargo for that port, took on board a general cargo of produce and merchandize for Savanilla, Colon, London, and Liverpool.

3. This general cargo consisted of goods shipped by various persons, and amongst these goods were 180 serons of bark, which were shipped on behalf of the plaintiffs for carriage to London under two bills of lading, which were in the same terms. The following are the material parts: "Shipped in good order and condition, by M. Ide Mier of Santa Martha, in and upon the good steamship the *Venezuelan* . . . now lying in or off the [89] port of *Santa Martha, 100 serons bark covered by consignees' open policy of insurance, to be delivered in the like good order and condition, subject to the terms and conditions stated in this bill of lading, which constitutes the contract between the shippers and the company, unto Messieurs Barbour (the plaintiffs' firm), or their assigns, at the port of London . . . the port of destination of the goods; average, if any, to be adjusted according to British custom. . . . The company is not liable for any loss or detention of, or damage or injury to the goods, or the consequences thereof, occasioned by any or several of the following causes, viz., the act of God, enemies, pirates, theft on land or afloat, vermin, barratry of master or mariners, restraint of princes, rulers, or people, fire on board, in hulk or in craft or on shore, or wagons, stranding, collisions, explosions, or straining, perils of the seas, rivers, navigation, land transit, lighterage, storage afloat or ashore, interruption to navigation by ice, transhipments, any act, neglect, or default of the pilot, master, mariners, engineers, servants, or agents of the company."

4. While the Venezuelan was at Santa Martha, loaded and about to sail, a fire broke out, at about 11 P.M. of the 18th of October, in the forehold. Every effort was at once made to extinguish the fire, by playing water down the hatchways by means of the firehose, and by cutting holes in the forecastle deck and pouring water down on the cargo stowed in the forehold. This was continued to be done until about 4 A.M. of the next day, when the men at work near the forehold were driven out by the heat and smoke. The steamship was then turned round, stern on to the wind, to keep the fire forward, and portions of the cargo stowed in the afterholds of the vessel were discharged into lighters. The fire hose was kept continually playing down the forehatch and the forecastle skylights, but it did not subdue the flames, and at about 8 A.M. the fire reached the upper deck. A hole was then cut in the side of the vessel, and her fore-compartment was thereby filled with water. By this means the crew ultimately succeeded in extinguishing the fire. If this had not been done the remaining cargo would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck.

5. The whole of the contents of the forehold were entirely destroyed by fire, and a great part of the cargo stowed in the *adjoining holds were damaged or destroyed by the water [90 which was poured or let into the vessel in order to extinguish the fire.

6. It is admitted, for the purpose of this case, that 152 of the 180 serons of bark, shipped on behalf of the plaintiffs, were destroyed by the water poured or let into the said steamship in the manner above described.

7. It has been the practice of British average adjusters, in adjusting losses, to treat a loss occasioned by water in the manner above described as not a general average loss.

8. The Venezuelan, after discharging and reloading cargo and undergoing temporary repairs at Santa Martha, subsequently proceeded on her voyage, and delivered the various portions of the cargo to the respective owners or consignees thereof.

9. The court was to be at liberty to draw such inferences of fact as a jury would be justified in drawing.

The question for the opinion of the court was, whether the plaintiffs are entitled to recover from the defendants any sum of money, by way of general average contribution or otherwise, in respect of the aforementioned loss of the 152 serons of bark.

Nov. 8, 1872. *Butt*, Q.C. (*Cohen* with him), for the plaintiffs. First, the loss of the bark under the circumstances described was clearly a general average loss. Any voluntary sacrifice of

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part of the adventure, or voluntary subjecting of part to increased risk for the general good, constitutes the subject of general average. In Benecke, Pr. of Indem., p. 243, this precise case is considered, in the author's opinion, to be general average although the practice of British average adjusters is to the contrary. He says: "If water were thrown down the hatches to stop the progress of an accidental fire in the hold or between the decks, this must be conceived to be done with the double intention of saving the article which has already caught fire from utter destruction, and of extricating the vessel and the rest of the cargo from an imminent danger. The effect of the water on the former goods is, therefore, particular average; it is not an injury, but a real advantage done them. But the damage done by the water to other goods is, I conceive, of the nature of general average, upon the same principle on which occasional [91] damage done to goods during *jettison is considered as such." Again, in Baily on General Average, c. 3, r. 10, p. 40 (2d ed.), it is said: "Damage done to cargo by pouring water down upon it, in order to extinguish a fire which has not touched the goods injured by the water, is excluded from general average. The principle upon which this rule is based is erroneous, as was stated above (p. 11, note); and the rule is clearly inequitable." The author refers in similar language to the practice at pp. 81, 82. [See the judgment, post, p. 94.] The principle of the disallowance seems to be that it is a moral certainty that the fire would consume the cargo if it be not extinguished by throwing water on the cargo, and so the cargo is in no worse position, although the rest of the adventure be saved by the operation. There is no English case directly in point; but *Johnson v. Chapman* (¹), may be referred to for the principle: There are, however, two American cases in point: *The Brig Mary* (²) and *Nimick v. Holmes* (³); the latter is precisely this case. There, after discussing the principles applicable to general average and the instances given, the court comes to the conclusion that the loss so occasioned is general average. [He read the passage given, post, p. 94, in the judgment of the court.] In 2 Arnould, Ins. pp. 769, 770 (4th ed.), instances of general average loss are given, and among them the present: "So when water is thrown down a ship's hatches to extinguish an accidental fire, and other goods are damaged thereby." The opinion of Stevens, On Average, pp. 41, 42 (5th ed.), is to the same effect. Secondly, it will be said that the plaintiffs are precluded by the clause in the bill of lading, "average, if any, to be adjusted according to British custom;" but this refers to

(¹) 19 C. B. (N.S.), 563; 35 L. J. (C.P.), 23.

(²) 1 Sprague's Decisions, 17.

(³) 25 Pennsylv. Rep., 366, 373.

the mode of statement as to the proportion to which cargo and ship are to contribute, which varies in different countries, and ought not to be taken to refer to a custom erroneous in law, as distinguished from law; it in effect says the statement shall be made and the contribution calculated according to the British law.]

[QUAIN, J. This was a bill of lading to London; that, being the port of destination, would be the port of adjustment, and therefore in the view suggested that clause would have no meaning.

*The ship was going to Colon, and the same form of bill [92 of lading is used. Moreover, the adventure might have been broken up at an intervening port, in which case, as pointed out in 2 Arnould on Ins. p. 812 (4th ed.), that port becomes in effect the port of discharge and the place of adjusting the general average. See also to the same effect 1 Parsons on Shipping, b. 1, c. 9, s. 21, p. 465. The clause cannot mean that the average adjuster is to determine conclusively what is and what is not general average. At all events, not if the custom is invalid according to the general law.

[COCKBURN, C.J. If the parties select the practice of a particular country as to adjustment, why are they not to be bound by it? Although contrary to law, there is nothing illegal in it.]

Sir G. Honyman, Q.C. (*R. G. Williams* with him), for the defendants. The plaintiffs are concluded by the bill of lading; they have agreed to be bound by the British practice as to average: the words are not "general average," but "average," i. e., loss, to be adjusted according to British custom, and it is immaterial whether it is a valid custom; if it is not illegal, they are bound by it. It is clear that is what is meant. The first thing an average adjuster does when the papers are laid before him is to determine what is general and what is particular average. And as "there is a great diversity in the practice of different countries with regard to what shall or shall not be included in general average," 2 Arnould, Ins. p. 813 (4th ed.), this clause was inserted. It is admitted in the case that this was not general average according to the British practice: and in addition to the authorities cited, Hopkins on Average may be cited to the same effect (pp. 59, 60, 3d ed.), and while saying the practice is not to be defended on principle, he says it may be on the ground of expediency. Whatever may be the practice of average staters of the particular country, if the parties have agreed to it, they are bound by it: *Harris v. Scaramanga* (1).

Butt, Q.C., in reply. The bill of lading uses the word "cus-

(1) Law Rep., 7 C^oP., 481.

tom," not "practice;" custom must mean a valid custom, as in accordance with the general law of the land.

[QUAIN, J., referred to *Miller v. Tetherington*.⁽¹⁾]

Cur. adv. vult.

93] *Jan. 25. The judgment of the court (Cockburn, C.J., Mellor, and Quain, JJ., was delivered by

QUAIN, J. This is an action brought by the plaintiffs as the owners of 152 serons of bark, shipped on board one of the vessels of the defendants to recover a general average contribution in respect of the loss of the bark on a voyage from Santa Martha to England.

The first question argued before us was, whether the loss in question was a loss which properly formed the subject of a general average contribution, according to the law of England.

The manner in which the loss was occasioned is described in the 4th, 5th, and 6th paragraphs of the special case. It appears that while the ship was lying at Santa Martha, and just when she was about to sail, a fire broke out in the forehold. Every effort was made to extinguish it by playing water down the hatchways, and through holes cut in the fore-castle deck. This not being sufficient to subdue the fire, a hole was cut in the side of the ship and her fore-compartment was thereby filled with water. In this manner the fire was extinguished; and it is found and admitted in paragraph 4, that if that course had not been taken the remaining cargo (a portion having been discharged into lighters would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. It is admitted in paragraph 6 that the plaintiff's bark was destroyed by the water poured or let into the ship in the manner described in order to extinguish the fire.

On these facts we are clearly of opinion that the loss was, according to the general law, properly the subject of a general average contribution. It was a voluntary and intentional sacrifice of the bark made under the pressure of imminent danger, and for the benefit and with a view to secure the safety of the whole adventure then at risk. No case has been cited in which the exact point to be decided has arisen in our courts; but we have been referred to an American case in which the question was considered and decided.

That case is *Nimick v. Holmes* (?), decided in the Supreme Court of Pennsylvania. There Lowrie, J., in delivering the judgment of the court says, "Guided by the light of the rule and its instances, we feel constrained to say that when a vessel

(¹) 6 H. & N., 278; 30 L. J. (Ex.), 217; 7 H. & N., 954; 31 L. J. (Ex.), 363.

(²) 25 Pennsylv. Rep. 366, 373.

or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of the vessel in order to get at it, is general average. The danger is a common one, and the cost of the remedy must be common. It makes no difference how the water is applied, by the aid of fire engines on the land, or in the form of steam, or by the scuttling the vessel . . . It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water in order to save the rest."

We quite agree with this conclusion; and, if the present case depended wholly on the common law applicable to general average losses, we think the plaintiffs would be entitled to recover.

But it is contended for the defendants that the general law, as we have just expounded it, is excluded in this case by the express terms of the bill of lading, which contains these words: "Average, if any, to be adjusted according to British custom," inasmuch as "British custom" can only mean the practice of British average adjusters; and it is admitted in paragraph 7 of the case, to be the practice of British average adjusters to treat a loss occasioned by water in the manner above described as not a general average loss.

It appears from the works of Mr. Stevens⁽¹⁾ and Mr. Baily, that the practice as stated in paragraph 7 does prevail among the British average adjusters, though it is condemned by both writers as unjust. "The damage done to cargo," says Mr. Baily⁽²⁾, "by pouring water upon it to extinguish a fire, or by water admitted into a vessel's hold when she is scuttled to extinguish a fire, is excluded from general average. In defence of this practice no valid reason can be urged. It is based on an erroneous idea that a general average cannot arise when the degree of danger is so great that it amounts to a moral certainty of total loss, and on a fanciful distinction between the degree of danger existing in the case of fire and the degree existing when a vessel is on her beam *ends, or on the point [95 of foundering — a distinction which the ingenuity of argument may draw, but which will not bear the test of common sense."

The question in this case, however, is whether the parties have not, by the words used in the bill of lading, made this practice a part of their contract, for, if so, they are bound by it, though the practice may be, according to the best opinions, vicious and unreasonable.

On the other hand it is argued for the plaintiffs that it was

(1) Stevens on Average, p. 41, 5th ed.

(2) Baily on General Average pp. 81, 82, 2d ed.

not intended by the expression used in the bill of lading, to draw any distinction between British law and British custom, and that the words were inserted solely in order to prevent the average being adjusted by different laws, according to the different ports of destination at which the ship stopped in the course of her voyage.

But we are only entitled to infer the meaning of the parties from the language which they have used; and as it appears on the face of the case, and also from the authorities above cited, that a practice prevails among British average adjusters not to allow a loss like the present as a general average loss, we can only construe the expression "British custom" as intended to apply to that practice, as the mode of adjusting the average by which the parties have agreed to be bound.

It follows, therefore, that, as the parties have agreed to make this custom a part of their contract, the case must be decided in accordance with the custom, and the result is that our judgment must be for the defendants.

It is to be hoped, however, that in future there will be no difference between law and custom on this point, and that average adjusters will act on the law as now declared, and that bills of lading will also be framed in accordance with it.

Judgment for the defendants.

Attorneys for plaintiffs: *Milne, Riddle, & Mellor.*

Attorneys for defendants: *Chester and Urquhart, for Haigh & Co., Liverpool.*

[Law Reports, 8 Queen's Bench, 96.]

Jan. 21, 1878.

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*ARNOLD V. HOLBROOK.

Highway — Limited Dedication — Right of Public to Deviate.

The plaintiff was the occupier of an arable field, across which was a public footpath, but the plaintiff and his predecessors had the right to plough up the footpath when ploughing the field. The public, when the way was muddy after being ploughed up, having deviated on to the plaintiff's field, the plaintiff, in order to prevent them from straying from the line of footpath, placed hurdles on the sides of it, some of which were thrown down by the defendant:

Held, that the footpath having been dedicated to the public, with a reservation of the right to plough it up, on its becoming impassable after being ploughed up the public had no right, in the absence of evidence of such a prescriptive right, to pass over the adjoining parts of the plaintiff's field; and that the defendant was liable in an action of trespass.

APPEAL from the County Court of Sussex, holden at Brighton.

The action was brought to recover damages for the defendant entering certain land in the occupation of the plaintiff, and throwing down certain hurdles.

The plaintiff was the tenant and occupier of an arable field, called Aldrington lane, over which was a footpath running diagonally across the field, in a straight direction from one end to the other, and which path, it was admitted by the plaintiff, the public had a right to use, but such user was subject to the right of the plaintiff and others, the owners and occupiers of the field, to plough up the path whenever they required so to do in ploughing the field.

The right of the plaintiff so to plough up the path had been determined by the Court of Exchequer Chamber in *Arnold v. Blaker* ⁽¹⁾.

The footway in question is the nearest way by half a mile from the Portslade station of the London, Brighton, and South Coast Railway to the village and parish church of Portslade, and is the only footpath leading from the village to the station. The railway station was opened for public traffic in 1842, and since that time the number of inhabitants of the village and parish of Portslade has increased very largely. Since 1842 the footway has been much more used by the public than before that time, and the jury found *that any path which prevented the plaintiff [97 from ploughing through it as formerly would be a prejudice to him and not a benefit.

After the decision in the case of *Arnold v. Blaker* ⁽¹⁾ the surveyors removed the material hardening the path, and the plaintiff afterwards ploughed up the path as portions of the field were ploughed up in the ordinary cultivation thereof, and sowed the whole with wheat, but did nothing, after such ploughing up and sowing, to define the path for the use of the public.

After the plaintiff had so ploughed up and sown the field and path, the public continued to walk across the field in the direction where the path had been; but finding the ground where the path had been in a muddy and bad condition, they walked out on either side of it for a better way, and in some parts to a width of eighteen feet or thereabout, injuring thereby the plaintiff's crops.

To prevent the public from so walking out on either side, the plaintiff placed hurdles on the parts which had been thus trodden over by the public at irregular intervals, but not opposite to each other, they being about twelve yards from each other, at right angles to the line where the path had been first trodden out on either side of it, leaving a space of about six feet between the inner ends of the hurdles, and which hurdles were dangerous to the public in the dark. The plaintiff had in previous years placed, at intervals, bushes for a similar purpose after the

(1) Law Rep., 6 Q. B., 488.

field had been ploughed, but the public often walked outside of them when the path had become in a bad state.

The defendant threw down three of the hurdles, and it was for such alleged trespass that the present action was brought.

The judge gave judgment in favor of the defendant, on the ground that it was the duty of the plaintiff, after he had ploughed up the path, to set out again a proper path for the use of the public, instead of leaving them to tread out a path in the best way that they could; and that the path so trodden out having become in a muddy and foundrous state, the public were justified in deviating on the plaintiff's land to find a firmer and better path. That it was by the plaintiff's own negligence that the alleged trespass was occasioned, and that such negligence [98] contributed to *the injury complained of, and that the defendant was therefore justified in removing the hurdles.

The question for the opinion of the court was whether, under the circumstances, the defendant was or was not justified in removing the hurdles.

Munisty, Q. C. (*Grantham* with him), for the plaintiff. The right of the plaintiff to plough up the path was settled in *Arnold v. Blaker* ⁽¹⁾. The only right in the public is to cross the field in the line where the path runs; if they deviate from that line they are trespassers, and the plaintiff is justified in preventing them from straying over his field. The decision of the county court judge is clearly wrong.

J. Brown, Q.C. (*Lord* with him), for the defendant. First: The public have an absolute right to pass over the adjoining land when the path is foundrous. Secondly: Inasmuch as the hurdles were put in places where they are dangerous, the defendant was entitled to remove them as nuisances.

[*COCKBURN*, C.J. The right to deviate may be annexed by prescriptive enjoyment to a highway, but it cannot be presumed to exist as an incident to a limited dedication.]

There is a distinction between public and private ways. There is no right to deviate in the latter case, but there is as to the former. This was decided in *Taylor v. Whitehead* ⁽²⁾, and in *Bullard v. Harrison* ⁽³⁾, the law is laid down by Lord Ellenborough. Lord Holt says, in *Young v.*—⁽⁴⁾, that where there is a way through a great open field which may become foundrous the travellers may justify the going over the outlets of the land not enclosed next adjoining; and in *Rolle's Abr. tit. "Chimin Common"* (A.) it is stated that if a highway become so out of repair and foundrous as to be impassable or even in-

⁽¹⁾ *Law Rep.*, 6 Q.B., 488.

⁽²⁾ 2 Doug., 745.

⁽³⁾ 4 M. & S., 387, 392.

⁽⁴⁾ 1 Ld. Raym., 725.

commodious, the public have a right to go on the adjacent ground, whether it be cultivated or uncultivated. In *Henn's Case* ⁽¹⁾, a case is mentioned in which the way being foundeours, it was held that the public might deviate into good and passable ground.

[*BLACKBURN, J. That is not an authority; the attorney [99 general merely mentions that case in his argument.]

In *Absor v. French* ⁽²⁾ the same law is laid down.

[BLACKBURN, J. There the owner of the soil had obstructed the way.]

It is laid down in all the text books, that if a public way is foundeours and impassable, the public have a right to go on to the adjoining land: 2 Bl. Com. p. 36; Gale on Easements, p. 492; Glen on Highways, p. 176; 2 Burn's Justice, 30th ed. p. 984; Williams on Real Property, 9th ed. p. 311.

[BLACKBURN, J. The foundation for those dicta is *Duncomb's Case* ⁽³⁾, but upon examination the facts will be found to be different from the present; the defendant had narrowed the way; moreover, according to the *placitum* in 1 Rolle Ab., 390 (A), pl. 1. the public had been from time immemorial accustomed to deviate.]

In *Daves v. Hawkins* ⁽⁴⁾ the court assumed that the right to deviate from a foundeours highway existed. As to the second point. The hurdles are placed so near to the highway as to be a nuisance: *Hardcastle v. South Yorkshire Ry. Co.* ⁽⁵⁾; *Barnes v. Ward* ⁽⁶⁾; and being a nuisance, the defendant was justified in removing them.

Manisty, Q.C., in reply, as to the second point. The cases cited decide that if there is a nuisance near a highway, and an injury is caused to a passer by, an action lies, but they are no authority that he may go on the adjoining land to abate a nuisance.

[BLACKBURN, J., referred to *Dimes v. Petley*. ⁽⁷⁾

MELLOR, J., referred to *Winterbottom v. Lord Derby*. ⁽⁸⁾]

COCKBURN, C.J. I am of opinion that the decision of the county court judge is wrong. It is quite unnecessary to consider the doctrine that where a road is foundeours, the public may have an immemorial right to pass over the adjoining land. In ancient times, the right might exist; in those days the road passed over uncultivated tracts, and the liability to repair was not well *established, and for public convenience the [100 passengers were obliged to do the best they could. But in all

⁽¹⁾ 2 Show., 28. ⁽²⁾ W. Jones, 926.

⁽³⁾ Cro. Car., 366

⁽⁴⁾ 8 C. B. (N.S.), 848; 29 L. J. (C.P.),

343.

⁽⁵⁾ 4 H. & N., 67; 28 L. J. (Ex.), 189.

⁽⁶⁾ 9 C. B., 392; 19 L. J. (C.P.), 195.

⁽⁷⁾ 15 Q. B., 276; 19 L. J. (Q.B.), 449.

⁽⁸⁾ Law Rep., 2 Ex., 816.

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the cases which have been cited, the dedication to the public had been unlimited. That doctrine is not applicable to a restricted dedication and user of a highway. Here, there has always been a right in the occupier of the land to plough up the path. The path has been in a known direction, and when the occupier of the land ploughs up the way it soon gets into a muddy state; but inasmuch as there has always been a right to plough it the rights of owner of the soil and of the public depend on the circumstance that the dedication is limited; and as the owner had reserved this right the public must accept the terms upon which the way was dedicated. On the second point, I cannot concur in the argument that under the circumstances the defendant was justified in removing the hurdles. He removed them simply in order to enable him to go upon the adjoining land. It may be that, if the defendant had been injured by the hurdles being placed so close to the path, he might have brought an action, but it is a different thing to say that under the circumstances stated in the case, the defendant can abate the nuisance. A private individual can abate a nuisance when necessary to exercise a right, but here the defendant seeks to exercise a right which we hold does not exist. On both grounds the defendant fails.

BLACKBURN, J. The judgment of the county court judge must be reversed. The first question is, whether or not there is a right of deviation from the footway, because the footway is foundrous. There are a great many dicta in the books, but they are all founded on Duncomb's Case, in Cro. Car., 366; also to be found in 1 Rolle's Abr. 390 (A), pl. 1. In that case there was a prescriptive highway, and when it was out of repair the public used to deviate on the outlets, which I gather to be certain defined portions of ground, over which the public had immemorially passed. Duncomb had taken possession of the outlets, and therefore had deprived the public of them; and it was held that he was therefore bound to repair the road. But in this case, it is not stated that there was an immemorial right to deviate. It is quite reasonable to say that where there is a prescriptive highway over a close there may be a prescriptive [101] right to deviate on adjoining lands. But it *would require strong authority to persuade me that where there is a limited dedication only, the public would have a right to deviate. In the case cited from Shower (¹), it was not necessary to consider whether there was a right of deviation; the plaintiff had stopped up the way. Here the footway is out of repair because it is ploughed up, and it is therefore necessarily

(¹) *Abner v. French*, 2 Show. 28.

founderous, and to say on that ground that the adjoining cultivated ground is to be trampled over by persons deviating from the footway, is contrary to common sense and justice.

As to the second point, that the defendant can justify the removal of the hurdles, *Dimes v. Pelley* (2), is in point. It is clear he cannot do so.

MELLOR, J. Whether there could be a limited dedication of a highway was considered in *Arnold v. Blaker* (1), and the true doctrine on the subject is there laid down; and when once it is considered that there may be a limited dedication the case is decided. The cases cited by Mr. Brown, are not applicable.

As to the second point, *Dimes v. Pelley* (2) is in point.

LUSH, J. I am of the same opinion on both points, for the reasons already given.

Judgment for the plaintiff.

Attorneys for the plaintiff: *Palmer, Bull & Fry.*

Attorney for the defendant: *W. Clark.*

(1) 15 Q. B. 276; 19 L. J. (Q.B.), 449.

(2) Law Rep. 6 Q. B., 433.

If a public highway which the public have a right to use at all times without interference by the owner of the soil become founderous, one using it, may, if necessary to do so, pass over the land of the adjoining owner. It must, however, be a case of necessity or of sudden and recent obstruction.

Williams v. Safford, 7 Barb. 309; *Holmes v. Seeley*, 19 Wend., 510; *Campbell v. Race*, 7 Cush., 408; Angell on Highways, § 5.

The right does not, however, apply to private ways. *Taylor v. Whitehead*, 2 Doug., 745; *Holmes v. Seeley*, 19 Wend., 510; Angell on Highways, § 6.

[Law Reports, 8 Queen's Bench, 102.]

Jan. 25, 1873.

*HEYMANN v. THE QUEEN.

[102

Indictment—Defects cured by Verdict at Common Law—Conspiracy to remove Goods in Contemplation of Bankruptcy—32 & 33 Vict. c. 62, s. 11, subs. 4.

There is no distinction between civil and criminal pleadings as to defective allegations which are aided by verdict at common law.

Indictment that "defendant and others unlawfully and wickedly did conspire and agree together, contrary to the provisions of the Debtors Act, 1869, and within four months next before the presentation of a bankruptcy petition against defendant, fraudulently to remove part of the property of defendant to the value of 10*l.*, that is to say [enumerating divers articles], defendant then being a trader and liable to become a bankrupt."

To this there was a plea of not guilty, and a verdict of guilty and judgment. Error was brought on the ground that there was no allegation that defendant was ever adjudged bankrupt:

Held, that the fact of defendant having been adjudged a bankrupt was not necessary to complete the offence of conspiracy: it was complete if the persons

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charged had agreed to remove the goods in contemplation of an adjudication being obtained; and that this, though not expressly alleged, must be taken after verdict, to have been proved before the jury; and that the defect was therefore cured by verdict.

WRIT OF ERROR by the defendant on a judgment in an indictment for conspiracy.

The first count of the indictment alleged that Moritz Heymann and others named therein, on the 2d of January, 1872, "unlawfully and wickedly did conspire, combine, confederate, and agree together contrary to the provisions of the Debtors Act, 1869⁽¹⁾, and within four months next before the presentation of a bankruptcy petition against the said M. H., fraudulently to remove part of the property of the said M. H., to the value of 10*l.* and upwards, that is to say, divers [enumerating different articles], he the said M. H. then and there being a trader, and liable to become bankrupt, against the peace of our Lady the Queen."

The second and fourth counts were in similar terms, for 103] *conspiring to conceal part of the property of M. H.; and for conspiring to fraudulently dispose of goods obtained by M. H. on credit.

Plea, not guilty.

Verdict of guilty of the premises in the first, second, and fourth counts charged, and judgment of eighteen months imprisonment on each count.

The assignments of error were, that the indictment was not sufficient in law; that the object of the conspiracies alleged in the three counts was to commit offences under s. 11 of 32 & 33 Vict. c. 62, s. 11, subs. 4, 5, and 15, which section is limited to persons who have been adjudged bankrupt, whereas in neither of the counts it is alleged that defendant had been adjudged bankrupt. That there was no allegation that any creditor of defendant, entitled to petition, had presented a petition to the Court of Bankruptcy. That there was no allegation that defendant had been trading and was a debtor in 50*l.*, or that he had committed an act of bankruptcy. That there was no allegation that defendant and the other persons knew, at the dates of the alleged conspiracies, that defendant was a person to whom s. 11 of the Debtors Act, 1869, applied.

Jan. 22. *Besley*, for the plaintiff in error. The indictment is not for an offence under the Debtors Act, 1869, but for a conspiracy to commit offences under that act, and s. 19 of that act

(1) By the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, "Any person adjudged bankrupt . . . shall in each of the cases following be deemed guilty of a misdemeanor . . . 5. If after the presenta-

tion of a bankruptcy petition against him, . . . or within four months next before such presentation, he fraudulently removes any part of his property of the value of 10*l.* or upwards."

does not apply. It is an indictment at common law, and the facts must be alleged with all the particularity necessary to constitute the offence. In the first place, it is not alleged that any petition was ever presented, or that any adjudication in fact took place. In *Rex v. Jones* ⁽¹⁾ there was an allegation that the defendant had been adjudged a bankrupt by the commissioners, and that was held insufficient after verdict, as it ought to have been alleged that he was in fact and law a bankrupt. *Rex v. Mason* ⁽²⁾ and *Reg. v. Peck* ⁽³⁾ show what particularity is necessary.

[MELLOR, J. Those cases are virtually overruled by later cases.]

No doubt *Sydserrf v. Reg.* ⁽⁴⁾ is scarcely consistent with *Reg. v. Peck* ⁽³⁾; but that case is not noticed in the judgment [104 of the Court.

[BLACKBURN, J., referred to *Nash v. Reg.* ⁽⁵⁾.]

There the indictment was held cured by 7 Geo. 4, c. 64, s. 21. But the present indictment is not for an offence created by any statute, so that the statute of Geo. 4, does not apply. The indictment is at common law, and is therefore bad for not stating all the ingredients of the offence, *inter alia*, that a petition was presented and the defendant adjudged a bankrupt.

[BLACKBURN, J. That would be necessary to complete the offence under the statute; but in a conspiracy the offence may be complete although the contemplated crime is not committed. Why is it not a conspiracy to conspire to remove goods four months before a contemplated bankruptcy of the owner?]

Possibly it is; but there is no allegation that they conspired in contemplation of bankruptcy.

[BLACKBURN, J., referred to Com. Dig., tit. "Pleader" (C. 87), "By verdict;" and 1 Wms. Saunders, 2:8, n. (1), as to defects aided by verdict at common law.]

That only applies to civil pleadings.

[BLACKBURN, J. I know of no distinction between civil and criminal pleadings as to this. Is there any authority for saying there is any distinction?]

In 1 Chit. Crim. Law, p. 172, it is said, "It is further laid down that an indictment ought to be certain to every intent, and without any intendment to the contrary; and that it ought to have the same certainty as a declaration; for all the rules that apply to civil pleadings are applicable to criminal accusations. The last observation does not, indeed, sufficiently express the degree of precision required; for technical objections have been more frequently admitted to prevail in criminal than

⁽¹⁾ 4 B. & Ad., 345.

⁽²⁾ 11 Q. B. 245.

⁽³⁾ 2 T. R., 581.

⁽⁴⁾ 4 B. & S., 935; 83 L. J. (M.C.), 94.

⁽⁵⁾ 9 A. & E., 686.

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in civil proceedings, and it was expressly laid down by Lord Mansfield ⁽¹⁾, that a greater strictness is required in the former than is necessary in the latter; and in the first a defendant is allowed to take advantage of mere formal exceptions."

105] *Jan. 25. *Bromby*, in support of the indictment, was not heard.

BLACKBURN, J. This was a writ of error, argued on behalf of the plaintiff in error on the last crown paper day before the lord chief justice, my brothers Mellor, Quain, and myself; and at the conclusion of the argument we said we would consider whether it was necessary to hear counsel in support of the conviction, and we have come to the conclusion that there is no occasion to hear counsel.

The indictment was for conspiracy; and I need not cite any authority for the proposition, that a conspiracy is an offence that is complete as soon as there is an agreement to do a thing which would be, if done, though not a crime, such a matter as would bring the agreement to do it within the definition of conspiracy. Here the defendant has been convicted upon an indictment containing several counts, but all the objections raised apply in effect to the first count. [The learned judge read the count.] On that there is a plea of not guilty, and a verdict of guilty.

The Debtors Act, 1869 (32 & 33 Vict. c. 62), by s. 11, subs. 5, enacts, that a person who has been adjudged a bankrupt, if he has within four months next before the presentation of the petition fraudulently removed his goods, shall be guilty of a misdemeanor. It is clear, that if the agreement, alleged in the count, to enable him to remove his goods, was come to in contemplation of an expected adjudication, the offence would be at once complete, whether adjudication followed or not. The objection to the count, therefore, is that it does not state that the agreement or confederacy was in contemplation or expectation of an adjudication; and if the question had arisen upon demurrer, I am not quite prepared to say that that might not have been a good objection. But it is a general rule of pleading at common law—and I think it necessary to say, where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases—where an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after 106] verdict that the *verdict could not have been found on this issue without proof of this averment, there, after verdict,

(1) 1 Leach, at p. 134.

the defective averment, which might have been bad on demurrer, is cured by the verdict. The authorities upon that position, and the principles on which it proceeds, are to be found in 1 William's Saunders, at p. 228, n. ('). In the present case, if this agreement was in contemplation or expectation of an adjudication, there is no doubt that the offence was committed. The averment in the count is, that the defendant and the others confederated and agreed contrary to the Debtors Act, 1869; and it was a confederacy and agreement fraudulently to remove the defendant's goods contrary to the act, he being a trader liable to become bankrupt; but it is not expressly stated that it was in contemplation of a petition, but only that it was within four months of the petition. We think, upon the issue of not guilty, the jury could not have found that there was a conspiracy to remove the goods fraudulently and in contravention of the statute, unless it had been proved that it was in contemplation that an adjudication was to ensue. If it was in the contemplation of the parties that an adjudication should take place hereafter, the offence was committed, whether the adjudication followed or not, for the conspiracy is complete as soon as the parties have agreed. We therefore think that the objection comes to nothing, and the conviction must be affirmed.

Judgment affirmed.

Attorney for prosecution : *A. G. Dillon.*

Attorney for defendant : *H. Sydney.*

[Law Reports, 8 Queen's Bench, 112.]

Jan. 24, 1874.

*HUTLEY V. HUTLEY.

[112

Champerty — Relationship to One of Parties — Interest in Suit.

Declaration, that J. H., a brother of defendant and a cousin of plaintiff, had died, leaving large real and personal property; that defendant was heir-at-law of J. H., and one of his next of kin; that J. H. left a will whereby his real and personal property was left to persons other than plaintiff and defendant, and plaintiff believed that the will revoked a former will by which J. H. had bequeathed property to plaintiff; and that in consideration that plaintiff would take the necessary steps to contest the will and would advance money and obtain evidence for such purpose and instruct an attorney, defendant promised to share with plaintiff half the real and personal property which might come to defendant by reason of such proceedings:

Held, that the agreement amounted to champerty; and that the fact, that the plaintiff was a relation of the defendant and had some collateral interest in the suit, did not prevent a contract, by which he was to receive half of what the defendant recovered, being champerty.

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Hutley v. Hutley.

DECLARATION that one John Hutley, a brother of defendant and a cousin of plaintiff, had died, leaving extensive landed estates and large personal property; and defendant was the heir at-law of the deceased and one of his next of kin; and the deceased died, leaving a will whereby his property real and personal was left to persons other than plaintiff and defendant; and plaintiff believed that such will revoked a former will by which the testator had bequeathed certain property to plaintiff; and in consideration that plaintiff would take the necessary steps to contest the validity of the said will, and would advance certain moneys and obtain evidence for such purpose and instruct an attorney in that behalf, defendant promised that he would pay to plaintiff one half of any personal property and convey to him a moiety [113] of any landed *estates he might recover or which might come to him, defendant, by reason of the taking of such proceedings for the setting aside such will; and plaintiff took such steps as aforesaid, and advanced certain moneys and instructed an attorney, and a large sum of money was thereby recovered by defendant, and the said will was declared invalid and defendant became entitled to and obtained possession of large landed estates of the deceased. Allegation of all conditions precedent. Breach that defendant had not paid to the plaintiff half the said personal property or conveyed to him one half of the said real estates.

Demurrer. Joinder in demurrer.

Philbrick (*Pearce* with him), in support of the demurrer. The agreement stated in the declaration is clearly maintenance, or, rather, champerty, unless it be brought within the exception as to relationship or interest: *Earle v. Hopwood* ⁽¹⁾; 2 Inst. 207; 4 Bl. Com., pp. 134, 135; 32 Hen. 8, c. 9; *Sprye v. Porter* ⁽²⁾; *Stanley v. Jones* ⁽³⁾. Then as to the relationship, the plaintiff and defendant are at most cousins, one being stated to be the cousin and the other the brother of the testator; that relationship is clearly insufficient to justify the agreement. In 1 Hawkin's P. C., p. 458 (8th ed.), tit. "Maintenance," s. 26, it is said: "It seems to be agreed that whoever is in any way of kin or affinity to either of the parties, so long as the same continues, or but related to him by being his godfather, may lawfully stand by him at the bar and counsel and assist him, and also pray another to be of counsel for him; but that he cannot justify the laying out of his own money in the cause, unless he be either father, or son, or heir apparent to the party, or the husband of such heiress." Secondly, as to the interest, all that is alleged

⁽¹⁾ 9 C. B. (N.S.) 566; 30 L. J. (C.P.), 217.

⁽²⁾ 7 E. & B. 58; 26 L. J. (Q.B.), 64.

⁽³⁾ 7 Bing., 369.

is that the plaintiff believed that he had an interest under a former will.

[BLACKBURN, J. A *bonâ fide* belief, though erroneous, would seem to be sufficient to prevent assisting in a suit being maintenance in the criminal sense.]

No doubt it was decided in *Findon v. Parker* ⁽¹⁾ that a reasonable ground for believing that they had a common interest would justify persons maintaining a suit. And that case was followed by Wigram, V.C., in *Hunter v. Daniel* ⁽²⁾; but there the interest was direct, and identical with that of the parties to the suit. Here at most it is collateral only.

[BLACKBURN, J. Moreover that was a case of maintenance, not champerty.]

That distinction makes the case no authority for the present plaintiff.

Day, Q.C. (*Anderson* with him), for the plaintiff. It is stated that the plaintiff believed he had a direct interest in establishing the invalidity of the will which left all the property away from the defendant, so that the interest of the plaintiff and defendant was identical. In *Findon v. Parker* ⁽³⁾ Lord Abinger, C.B., remarks in the course of the argument: "Surely the old cases are now exploded. The sole question is, have the parties an interest, or do they believe they have an interest in the action?" And when counsel cited Co. Litt. 268, b., maintenance is "when one maintaineth the one side without having any part of the thing in the plea or suit:" Rolfe, B., said: "Surely in a matter which is considered criminal, that must mean, without having, or believing himself to have an interest;" and in his judgment he says, illegality is not to be presumed; any construction which can be put upon the agreement making it lawful must be adopted.

[BLACKBURN, J. The agreement in *Sprye v. Porter* ⁽⁴⁾ was less open to objection than the present agreement.]

There the plaintiff had no interest whatever.

[LUSH, J. How does this kind of collateral interest prevent this agreement from being champerty, which is said to be the most odious form of maintenance?]

In 2 Roll Ab. p. 115, tit. "Maintenance," (H) "Consanguinity," it is said: "Some books say generally that a man may maintain his blood," or "his ally, 9 Hen. 6, 64."

Philbrick was not heard in reply.

BLACKBURN, J. The question is whether the contract disclosed *on this declaration is such as can be enforced in a court [115 of law. Putting out of the question, for the moment, the po-

⁽¹⁾ 11 M. & W., 675.

⁽²⁾ 11 M. & W., at p. 679.

⁽³⁾ 4 Hare, 420, 431.

⁽⁴⁾ 7 E. & B., 58; 26 L. J. (Q.B.), 64.

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sition of the plaintiff, it alleges that the defendant is heir-at-law and one of the next of kin of a deceased person who had made a will by which the personal and real estate were left away from the defendant, and in consideration that the plaintiff would take the necessary steps to contest the validity of the will, and would advance certain moneys, and obtain evidence, and instruct an attorney, the defendant promised to pay to the plaintiff one-half of the personal estate, and convey to him a moiety of the real estate, which the defendant should recover. If that stood without more, it is clear that it is champerty by the English law, which says that a bargain, whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal: *Sprye v. Porter* ⁽¹⁾ was one of the cases cited, and I entirely agree with what is there said. Lord Campbell, delivering the judgment of the court says: "Here we have maintenance in its worst aspect, the plaintiff and Rosaz, entire strangers to the property which they say the defendant has a title to, but which is in possession of another claiming title to it, agree with him that legal proceedings shall be instituted in his name for the recovery of it, and that they will supply him, not with any specified or definite documents or information, but with evidence that should be sufficient to enable him successfully to recover the property. Each of them is to have one-fifth of the property when so recovered; and unless the evidence with which they supply him is sufficient for this purpose, they are to receive nothing. They are not to employ the attorney, or to advance money to carry on the litigation; but they are to supply that upon which the event of the suit must depend, *evidence*; and they are to supply it of such a nature and in such quantity as to secure success. The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury and to a perversion of justice. Upon principle such an agreement is clearly illegal: and *Stanley v. Jones* ⁽²⁾ is an [116] express authority to that effect." Putting aside *that the plaintiff there was an absolute stranger, the present agreement goes further than that, for the present plaintiff agrees to instruct an attorney and advance money, and falls short of it so far as that the present plaintiff only agrees to obtain evidence, whereas in *Sprye v. Porter* ⁽²⁾ the plaintiff undertakes to supply evidence sufficient to ensure success. But the mischief is as great in the one case as in the other, and both agreements are void as amounting to maintenance and champerty.

(1) 7 E. & B., 58, 81; 26 L. J. (Q.B.), 64, 71.

(2) 7 Bing., 369.

(2) 7 E. & B., 58; 26 L. J. (Q.B.), 64.

But then it is argued that the position of the plaintiff with relation to the defendant and the property in question takes it out of the rule against champerty and maintenance. The declaration alleges that the plaintiff was a cousin of the deceased, and so a relation of the defendant, who was the deceased's brother; and the plaintiff's counsel cited cases which he said showed that such relationship prevented an agreement like the present from being illegal. But he produced no authority that blood relationship between the parties made any difference as to champerty. Then the further allegation was relied on, that the plaintiff believed that the will which was to be contested revoked a former will by which the testator had bequeathed certain property to the plaintiff; and it was argued that because the plaintiff thought he had an interest in the litigation by which the one will was to be upset and the other revived, the agreement was not illegal. But the litigation was to be maintained by the plaintiff not solely, as far as he was concerned, for any benefit he might directly or indirectly derive himself from upsetting the will, but the bargain was that he would maintain the action in consideration of the defendant transferring to him half the property which the defendant might become possessed of as the fruits of the litigation. While, therefore, I incline to agree with every word that is said by Lord Abinger and Lord Cranworth in *Findon v. Parker* ⁽¹⁾, that an agreement to assist in bringing an action is not made maintenance by the fact that the party turns out to be mistaken in supposing that he had a common interest with the litigant parties in the result of the suit; I can not see that that case is any authority for the present plaintiff. If every word that is said in the declaration about the plaintiff's belief in his interest in the subject matter of the suit were true, *that would not justify or make legal the [117 agreement to share in the property to be recovered by the defendant. There must, therefore, be judgment for the defendant.

LUSH, J. I am of the same opinion. It is conceded by the plaintiff's counsel that if it were not for the plaintiff's interest the contract in the declaration would amount to champerty. First, the plaintiff is a cousin of the deceased; that would give him no interest. Nor would the relationship to the defendant justify an agreement of champerty. Then there is the allegation that the plaintiff believed that the will revoked a former will by which the testator had bequeathed certain property to the plaintiff, and assuming that this shows that the plaintiff had, or thought he had, a collateral interest in contesting the will, that collateral interest would not justify an agreement to share

(1) 11 M. & W., 675, 679.

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the property which the defendant should acquire by successfully contesting the will. There are cases which show that there are circumstances which may justify a person in maintaining, that is, in assisting, one of the litigant parties in a suit; certain relationship would justify maintenance; but I know of no case, and Mr. Day has not produced the semblance of an authority for saying that relationship or collateral interest justifies champerty. Therefore the additional allegations in the declaration do not make the agreement good.

ARCHIBALD, J. I am also of opinion that the declaration is bad. It does not show any circumstances, either on the ground of relationship or interest, to make the agreement good. There are cases to show that a common interest, or even a *bonâ fide* belief in the existence of a common interest, would justify the mere maintenance of the suit; but they go no further. The present case falls within the principle of *Sprye v. Porter* ⁽¹⁾.
Judgment for the defendant.

Attorney for plaintiff: *Dillon*.

Attorneys for defendant: *Paterson, Snow, & Burney*.

(¹) 7 E. & B., 58; 26 L. J. (Q.B.), 64.

[Law Reports, 8 Queen's Bench, 134.]

Jan. 31, 1873.

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*THE QUEEN v. LEFROY.

Inferior Court of Record — County Court, Jurisdiction of, over Contempt committed out of Court 9 & 10 Vict. c. 95, ss. 3, 113.

By 9 & 10 Vict. c. 95, s. 3, the county courts were established and were made courts of record. By s. 113 the judge is empowered to impose a fine not exceeding 5*l.*, or to imprison for a term not exceeding seven days, for any contempt committed in court.

Held, that the jurisdiction of the judge of a county court was confined by s. 113 to contempts committed in court; and he had no power to proceed against a person for a contempt committed out of court.

Seemle, that inferior courts of record have only power over contempts *in facie curiæ*.

RULE calling on the judge of the Somersetshire County Court, holden at Crewkerne, to show cause why a writ of prohibition should not issue prohibiting him from proceeding against one J. H. Jolliffe, for alleged contempt of court.

It appeared from the affidavits that in a plaint of *Larcombe v. Marsh*, in the County Court of Crewkerne, a verdict and judgment had been given for the defendant, and a judgment sum-

mons obtained against the plaintiff for the costs. On the hearing of the summons, in investigating the plaintiff's means of payment, the judge made some strong observations on Mr. J. H. Jolliffe, who was attorney for the plaintiff, imputing to him misconduct towards his client. The matter was referred to the registrar, to ascertain what means, if any, the plaintiff had.

Pending this inquiry Mr. Jolliffe wrote a letter, which was published in a local newspaper, commenting in strong terms on the conduct of the judge; and saying, as to one statement made by the judge, "The statement was a monstrosity, and, as I can now say without fear of an arbitrary or tyrannical abuse of power, an untruth." On this the judge caused a citation to be served on Mr. Jolliffe to appear at the next court to be holden on the 18th of October, 1872, to answer for his contempt.

A prohibition was immediately applied for at Judges Chambers, and on the hearing before Quain, J., he referred the matter to the court, ordering a stay of proceedings in the meantime.

In Michaelmas Term this rule was obtained, on the ground that *the judge of a county court had no power to punish [135 for contempt not committed in the face of the court.

Manisty, Q.C., and *Oppenheim*, showed cause. The writing and publishing of this letter, pending the proceedings to which it referred, was clearly a contempt of the court. In such a case it is clear that the superior courts could have visited the contempt, though out of court: see *Rex v. Abmon* ⁽¹⁾. The case is not within s. 113 of 9 & 10 Vict. c. 95 ⁽²⁾, the contempt not being in court; but the county courts, being made courts of record by sect. 3, have the same power as the superior courts:

⁽¹⁾ Wilmot's Op., 243, 254.

⁽²⁾ By 9 & 10 Vict. c. 95, ss. 1 & 2, the county courts are established, and by s. 3 they are made courts of record. By s. 113: "If any person shall willfully insult the judge or any juror, or any bailiff, clerk, or officer of the said court, for the time being, during his sitting or attendance in court, or in going to or returning from the court, or shall willfully interrupt the proceedings of the court, or otherwise misbehave in court, it shall be lawful for any bailiff or officer of the court, with or without the assistance of any other person, by the order of the judge, to take such offender into custody, and detain him until the rising of the court; and the judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the court, to commit

any such offender to any prison to which he has power to commit offenders under this act, for any time not exceeding seven days) or to impose upon any such offender a fine not exceeding five pounds for every such offence, and, in default of payment thereof, to commit the offender to any such prison as aforesaid for any time not exceeding seven days, unless the said fine be sooner paid."

By s. 114: "If any officer or bailiff of any court holden under this act shall be assaulted while in the execution of his duty, or if any rescue shall be made or attempted to be made of any goods levied under process of the court, the person so offending shall be liable to a fine not exceeding five pounds, to be recovered by order of the court, or before a justice of the peace as hereinafter provided."

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see *Rex v. Faulkner* ⁽¹⁾; *Ex parte Pater* ⁽²⁾. In *Rex v. Clement* ⁽³⁾, Holroyd, J. says: "It is perfectly clear, as to the Courts of Westminster, that contempts may not only be in the face of the court, but that they may be committed out of the court. ... Courts inferior to the Courts of Westminster may clearly fine and imprison for a contempt, if they are courts of record, as the Court of Quarter Sessions and the Court of Oyer and Terminer." That was a case of a contempt committed out of court, by publishing, contrary to the order of the court, an account of prosecutions pending in the court of jail delivery for Newgate; and the Court of Queen's Bench held that the court, which is an inferior court of record, had power to fine for the contempt, and discharged the rule for a certiorari to quash the order inflicting the fine. That case is, therefore, in point. So also is the case of *Re Crawford* ⁽⁴⁾. *Ex parte Fernandez* ⁽⁵⁾ and *McDermott v. Beaumont* ⁽⁶⁾ may also be referred to.

[COCKBURN, C.J. All the cases cited were cases of contempt in court; or, if not, the court was a superior court of record.]

In *Rex v. Clement* ⁽⁷⁾ the court is called the court below; and Holroyd, J., expressly refers to the point of the power of an inferior court of record, in the passage already cited.

[COCKBURN, C.J. But whatever the general law may be, the power given to county courts is limited expressly by s. 113 to contempts in court. Is not that intended to be the measure of the power of the court as to contempts?

MELLOR, J. Following as it does s. 3, which simply makes the court a court of record.]

If the power of the court is limited to contempts in court, then the County Court has no means of enforcing its process out of court.

Sir J. B. Karlake, Q.C. (*Bullen* with him), in support of the rule. The last point made is answered by reference to s. 114. No presumption can be made in favor of the jurisdiction of an inferior court, though a court of record. The county courts are not even a court of record proceeding by the course of the common law, but they are a court of very limited jurisdiction proceeding by a new mode of procedure: *Owens v. Breese* ⁽⁸⁾. That the county courts are inferior courts, their jurisdiction being limited, there can be no doubt: *Lery v. Moylan* ⁽⁹⁾. The power, therefore, of the judge to punish for contempt is limited to the cases of contempt *in facie curiæ* by s. 113. That this was the express intention of the legislature is shown by 12 & 13

⁽¹⁾ 2 C. M. & R., 525.

⁽⁵⁾ 10 C. B. (N.S.) 3; 30 L.J. (C.P.) 321.

⁽²⁾ 5 B. & S., 299; 33 L. J. (M.C.), 142.

⁽⁶⁾ Law Rep., 2 P. C., 341.

⁽³⁾ 4 B. & Ald. 218, at p. 233.

⁽⁷⁾ 4 B. & Ald., 218.

⁽⁴⁾ 13 Q.B. 613; 18 L. J. (Q.B.), 225.

⁽⁸⁾ 7 Ex., 916; 20 L. J. (Ex.), 359.

⁽⁹⁾ 10 C.B., 189; 19 L.J. (C.P.), 308.

Vict. c. 101, s. 2, which re-enacts the very words of s. 113, the only change being a power to commit to another class of prison. Sect. 114, corroborates *this view, as it gives power to [137 the judge to fine for obstructing officers when serving process, &c; and thus the two sections give all the power necessary for enforcing due administration of justice in the court and its process out of court.

COCKBURN, C.J. The rule must be made absolute. I think that the judge of the county court has no authority to punish for contempt not committed in the face of the court. It is perfectly true that it is laid down by authority, and reason shows the correctness of the rule, that all courts of record have power to fine and imprison for any contempt committed in the face of the court: for the power is necessary for the due administration of justice, to prevent the court being interrupted. But it is quite another thing to say that every inferior court of record shall have power to fine or imprison for contempt of court when that contempt is committed out of court, as the writing or publication of articles reflecting on the conduct of the judge. There are other remedies for such proceedings.

The power to commit for contempt is fully gone into by Blackstone and Hawkins; but though this power is recognized in the superior courts, it is nowhere said that an inferior court of record has any power to proceed for contempt out of court; and there is an obvious distinction between the superior courts and other courts of record. In the case of the superior courts at Westminster, which represent the one supreme court of the land, this power was coeval with their original constitution, and has always been exercised by them. These courts were originally carved out of the one supreme court, and are all divisions of the *aula regis*, where it is said the king in person dispensed justice, and their power of committing for contempt was an emanation of the royal authority, for any contempt of the court would be a contempt of the sovereign. But it is a very different matter with respect to the county courts and similar inferior courts. No case is to be found in which such a power has ever been exercised by an inferior court of record, or, at all events, upheld by a decision of the superior courts.

Finding, therefore, this distinction, that the superior courts have exercised the power from time immemorial, and that no such power has ever been known to be exercised by an inferior court, that would be sufficient to dispose *of this case. [138 But in fact it is not necessary to go so far as that. The statute itself under which the county courts are constituted points out what was the extent of the power of punishing for contempt

intended to be conferred upon them. The legislature had anticipated the probability of contempts and the necessity of giving power to the courts of repressing these contempts when occurring in the court itself; and, accordingly, by s. 113 a power is given to the judge to order into custody till the rising of the court any person guilty of any misconduct in court, or to commit him to prison for any period not exceeding seven days, or to impose upon such offender a fine not exceeding 5*l.*, with the alternative of imprisonment of the same duration in default of payment.

But it is said that, although the legislature has thus limited the power to contempt in court, that was not intended to alter the law as to the general jurisdiction of a court of record, as it is possessed by inferior courts, of fine or imprisoning to any extent at their discretion. This would lead to a singular inconsistency. If a contempt were committed in the face of the court, the judge could only imprison the offender for seven days or fine him 5*l.*, while for a contempt out of court he might fine him several hundreds, or commit him for months, or even years. We therefore must understand the legislature to have confined the power to the instances given and to the extent limited. In either view, therefore, as it seems to me, we must hold the jurisdiction assumed by the judge to be beyond his powers; and the rule for a prohibition must be made absolute.

MELLOR, J. I am of the same opinion. I entirely agree with the lord chief justice on both points. The superior courts at Westminster have for all time had this power. In 2 Hawkins P. C. (8th ed.), p. 1, bk. 2, c. 1, it is said the old jurisdiction of the one supreme court was introduced after the conquest, in which the grand justiciary acted as viceroy; and out of this court was erected the Courts of Queen's Bench, Common Pleas, and Exchequer; and therefore the foundation of the authority of these courts, as to contempts committed in court and contempts out of court having a tendency to affect the administration of justice, was that they were part of the great court or *aula regis*. [39] The authority *of the courts of record has no such foundation; the matter stands on quite a different footing as to them; and no instance has been found where this power has been assumed or justified by any decision, otherwise than for contempt committed in the face of the court.

When, therefore, the statute makes the county courts courts of record, and protection is afforded by the statute against contempt committed in court, and the limit of the jurisdiction is defined by s. 113, the intention is clearly shown of confining the jurisdiction to contempt in the face of the court, leaving

what may be called contempt out of court to be punished by the general law, by indictment or otherwise. And that this is the intention is further fortified by s. 114, which gives a summary remedy against certain acts which would be contempts of court, and confines this remedy to the protection of the officers. It clearly would have been unnecessary to give this summary power to the court of inflicting a fine for interference with the process of the court had it been intended or supposed that the county court, as an inferior court of record, had the general authority which the superior courts have.

QUAIN, J. I am of the same opinion. As soon as it is ascertained that no case can be found in which imprisonment or fine has been inflicted by an inferior court of record for contempt not in the face of the court, it follows that the rule must be made absolute. Such a power has not been given to the county courts by statute, but it is contended that it is not taken away. I should doubt whether, if such a power did exist, it could be taken away except by express words. But no authority is to be found for the existence of any such power in an inferior court of record. The superior courts have always had the power of proceeding for contempt not committed in court. They had it, as Wilmot, C.J., points out, by immemorial usage (!). There were also many inferior courts of record, but no single instance is to be found of the exercise of this power by them. In 4 Blackstone's Commentaries, p. 283, this immemorial power is expressly confined to the superior courts; "To this head of summary proceedings may also be properly referred the method, immemorially used by the superior *courts of justice, of [140 punishing contempts by attachment, and subsequent proceedings thereon."

Then at p. 285 instances are given: "Some of these contempts may arise in face of the court; . . . others . . . by speaking or writing contemptuously of the court or judges acting in their judicial capacity." And then at p. 286 it is said: "The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon any superior tribunal. Accordingly we find it actually exercised as early as the annals of our laws extend.

(!) See Wilmot's Op. at p. 254.

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McGowan & Co. v. Dyer.

In 2 Hawkins, P. C., p. 93 (8th ed.), bk. 2, c. 18, s. 15, when speaking of the sheriff's torn, it is said: "It seems clear that the sheriff's power in this court is still the same it anciently was in all cases not within either of the statutes Magna Charta or 1 Ed. 4, c. 2, from whence it follows that he still continues a judge of record, and may impose a fine on all such as are guilty of any contempt in the *face of the court*." There the power of the sheriff as a judge of a court of record is expressly confined to contempt in the face of the court; and there is no reason why the power of one inferior court of record should be greater than that of another. The power is therefore not inherent in the county courts as courts of record, and it is not given by the statutes, which only makes them courts of record and gives them limited power over contempts in court.

Rule absolute.

Attorney for appellant: *R. D. Hughes, for J. R. Jolliffe Crewkerne.*

Attorney for defendant: *J. B. Lefroy.*

The publication, in a newspaper, printed and circulated in a place where the court is sitting, reflecting in severe and opprobrious terms on the character of a criminal prosecution then pending in the court, if the publication be made at a time and under circumstances which would naturally bring it to the attention of jurors in attendance upon the court is a contempt and punishable summarily as such. *Matter of Sturve* 48 N. H. Rep. 428 and cases cited; and *People v. Freer*, 1 Caines 518, 485; *Bronson's case*, 12 Johns., 460; *Yates v. Lansing*, 9 Johns., 417; *Rez v. Clement*, 4 Barn and Ald., 218; *Farley's case*, 2

Vesey Sen., 520. *Matter of Jones*, 13 *Vesey*, 237 and see note to *Sumner's ed.* p. 240.

Although such course will not be taken unless the court is satisfied the course of the party was calculated to obstruct the course of justice (*Birch v. Walsh*, 10 Irish Eq., 93). The court may, if satisfied the ends of justice require, exclude a reporter from the court room and refuse to allow him to report its proceedings. *U. S. v. Holmes*, 1 Wallace Jr. 1, 10-11. *Reg. v. Onslow*, 12 Cox Cr. Cas., 358, for contempt by public speeches on behalf of Tichborne claimant. To appear in 5th Eng. Rep.

[Law Reports, 8 Queen's Bench, 141.]

Feb. 17, 1873.

141] *McGOWAN and Company, Limited, v. DYER

Principal and Agent — How far a Company is affected by Fraud of its Managing Director — Assignment of Debt — Appropriation of Debt to Payment of Bill.

The plaintiffs, a limited company, of which C. was managing director, had begun printing a periodical for D. & Co., a firm consisting of the defendant's son and two others, and the periodical was being sold on commission by S. The plaintiffs, represented by C., refused to go on printing without a guaranty, and the defendant consented to become security by drawing a bill on D. & Co., and indorsing it to the plaintiffs, upon the understanding that he was to have funds

to meet it out of the debt accruing from S. to D. & Co. C. was told of this arrangement. Before the defendant drew this bill, C. had lent money to D. & Co., on his own account, and held their acceptance to his draft. When this latter bill became due, C. obtained an order on S. from the other two partners of D. & Co., without the knowledge or consent of the defendant or his son, and under this order C. obtained the amount due from S. to D. & Co., and appropriated it to the payment of this bill, the amount being more than sufficient to cover the defendant's bill. The plaintiffs having sued defendant on his bill:

Held, that the defendant had no defence as against the plaintiffs; for that the plaintiffs were not responsible for what C. did in getting his private debt paid, as, though he was their managing director, he was not then acting for them or in pursuance of any authority from them.

DECLARATION on a bill of exchange at one month for 34*l.* drawn by the defendant to his own order on Dyer & Co., and indorsed by defendant to plaintiffs; allegation of due presentment for payment and notice to defendant of dishonor.

The only material plea was the 4th, on equitable grounds, on which issue was joined.

At the trial, at the sittings in Middlesex after Hilary Term, 1872, Blackburn, J., held that this plea was not proved, and directed a verdict for the plaintiffs.

The plea and facts are fully set out in the judgment of the court.

A rule was afterwards obtained for a new trial, on the ground that there was evidence in support of the 4th plea.

May 25, 1872. *C. Marshall Griffith* showed cause. He contended that there was no sufficient evidence that Christie was a party to or had any knowledge of the arrangement that the defendant's bill was to be met by the proceeds of Messrs. Smith's account. But *conceding that there was some evidence [142 of this fact, still the 4th plea was not proved, inasmuch as it was a private bill of Christie's that was paid out of Smith's account, and the most material allegation in the 4th plea, that the plaintiffs received the money, was wholly disproved. Although Christie was managing director of the plaintiffs' company, what he did on his private account could not affect the plaintiffs.

June. 3. *G. Shaw* in support of the rule. He contended that there was, in equity, a valid assignment or appropriation of the money becoming due from Smiths, although there was no notice to them; and that as between Dyer & Co., the assignors, and the defendant, the assignee, this was a binding assignment; and also as against the plaintiffs, who had notice through Christie; for there was clearly evidence for the jury, notwithstanding his denial, that he was a party to the arrangement. The money, therefore, that was received by Christie from the Smiths, having been thus appropriated to the defendant's bill,

must be taken to have been received on account of that bill, as it could not be appropriated to any other debt as between the parties who had notice of the appropriation. He cited 2 Spence on Ch. Jur. pp. 852, 856, 858; *Tibbits v. George* ⁽¹⁾; *Row v. Durson* ⁽²⁾; *Whitfield v. Fausset* ⁽³⁾; *Malcom v. Scott* ⁽⁴⁾; *Rodick v. Gindell* ⁽⁵⁾; *Morrell v. Woolteen* ⁽⁶⁾; *Burn v. Carvalho* ⁽⁷⁾; *Steele v. Stuart* ⁽⁸⁾.
Cur. adv. vult.

Feb. 17. The judgment of the court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.), was delivered by

BLACKBURN, J. This was an action on a bill of exchange, drawn by the defendant on, and accepted by Dyer & Co., for payment of 34*l.* 0*s.* 6*d.* at one month, and indorsed by the defendant to the plaintiffs.

The material plea was the 4th, which was pleaded on equitable grounds, and which stated in substance that the bill was drawn [143] *and indorsed by the defendant, as surety for Dyer & Co., the acceptors, a firm consisting of W. S. Dyer, A'Beckett, and Hume, to secure a debt due from that firm to the plaintiffs; that the defendant was induced to draw and indorse the bill by the promise of Dyer & Co., that a sum of money which would become due from Smith & Son to Dyer & Co., exceeding the amount of the bill, and which would be payable at the time when the bill would become due, should be appropriated to payment of the bill: that the plaintiffs had notice of these facts; that after the maturity of the bill, Hume, with the privity and at the request of the plaintiffs, and without the knowledge or consent of the other partners in the firm of Dyer & Co., or of the defendant, obtained from Smith & Son the said debt, and paid it to the plaintiffs in discharge of another and different claim; and that the plaintiffs knew that the money was so obtained and applied without the authority or consent of the other members of the firm of Dyer & Co., or of the defendant.

Upon the trial before me it appeared that the plaintiff's company, of which one Christie was the managing director, had commenced printing for Dyer & Co., a firm consisting of W. S. Dyer (the defendant's son) Hume, and A'Beckett, a periodical was to be sold by Smith & Son on commission, and that Christie, as representing the plaintiffs, had refused to go on with the work upon further credit without a guaranty, in consequence of which the bill in question was given as a security for work to be done, and which afterwards was done for Dyer & Co. It

⁽¹⁾ 5 A. & E., 107, 115, 116.

⁽²⁾ 1 Ves. Sen., 331, 332.

⁽³⁾ 1 Ves. Sen., at p. 391.

⁽⁴⁾ 3 Hare, at p. 52.

⁽⁵⁾ 12 Beav., at p. 329; 19 L.J. (Ch.), at p. 120.

⁽⁶⁾ 16 Beav., at p. 203.

⁽⁷⁾ 4 My. & Cr. at p. 702.

⁽⁸⁾ Law Rep., 2 Eq., 84.

also appeared that Christie, prior to taking the bill in question, had lent on his private account a sum of money to Dyer & Co., for which he held their acceptance to a draft drawn in his own name; that when the latter was about to fall due, Hume, and A'Beckett, without the knowledge of Dyer jun., or of the defendant, gave to Christie, for payment of the latter bill, an order on Smith & Son, under which Christie obtained the amount of Smith & Son's debt to Dyer & Co., being more than the bill sued on, and applied it to the bill which he held in his own right.

Thus far the facts were not disputed. But it was further proved by Dyer jun., on behalf of the defendant, that when Christie refused to give further credit, he (Dyer) proposed to make over to *the plaintiffs Smith & Son's account, so [144] that they might receive the proceeds of the sale, but that Christie objected to this arrangement as being out of the ordinary course of business, and suggested that he (Dyer) should get his father (the defendant) to become surety and let him collect the money from Smith & Son, and so cover his liability; that he therefore applied to his father to draw the bill in question, telling him what Christie had said, and that his father consented to give the bill upon the understanding that he was to have funds to meet it out of Smith's account.

The defendant corroborated this statement, and added that after the interview with his son he went to Christie and told him of the arrangement he had made, and that he had upon these terms consented to give the bill. Upon this part of the case there was a conflict between Christie and the defendant and Dyer jun., Christie denying that he had any knowledge of the arrangement.

I was of opinion at the trial, first, that there was no evidence of any such arrangement between the defendant and the firm of Dyer & Co., so brought to the notice of Christie, the managing director of plaintiffs' company, as to make it inequitable in Christie to receive payment of his own debt from Dyer & Co. out of the money due to them from Smiths. And, secondly, that though (if there was such an arrangement) the effect might be to make Christie liable personally to the defendant, it could not affect the right of the plaintiffs (the company) to recover, the act of Christie in taking payment of his own debt, being in no way done for the company, or in pursuance of any authority, express or implied, from them.

I directed the verdict for the plaintiffs, leaving no question to the jury, and therefore the question on this rule for the court is whether there was any evidence proper to be left to the jury in support of the defendant's plea.

If the first point had been the only one in the case, we should probably have granted a new trial on the ground that the evidence was such that the opinion of the jury should have been taken on that point; but on the second point we agree that there is not any reason for holding the company responsible for the manner in which Christie received payment of his own private debt, though he happened also to be their managing director.

145] *In Story on Agency, the learned author states, in s. 452, the general rule that the principal is liable to third persons in a civil suit "for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them." He then proceeds, in s. 456: "But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit."

Christie, as managing director, had a most extensive authority to act for the company, and we do not at all question that the company must be bound by every act of his when acting for them within the scope of that extensive authority. But what he did here was in his private capacity, receiving payment of his own individual debt, and, extensive as his authority was, that act did not come within it. We see no principle on which the company should be liable for what he did, any more than an ordinary employer would be answerable for the act of his agent not acting within the scope of his authority.

It could not be said, if goods or funds pledged to a surety were improperly taken by a person acting for himself, that the surety would be discharged if it could be shown that the wrongdoer was a clerk or other agent of the principal creditor, though not acting in any way for his employer when he did the wrongful act, nor in pursuance of any authority, express or implied, from him.

The case would have been quite different if the loan from Christie, though in his own name, had really been on behalf of the company; but of that there was no evidence.

We agree, therefore, that the rule should be discharged.

Rule discharged.

Attorney for plaintiffs: *Michael.*

Attorneys for defendants: *Guillaume & Son.*

[Law Reports, 8 Queen's Bench, 153.]

Feb. 5, 1873.

*In the MATTER of MARY ELLEN ANDREWS (an Infant). [153

Testamentary Guardian under 12 Car. 2, c. 24, s. 8 — Right to Custody of Ward — Habeas Corpus — Discretion of Court — Validity of Appointment.

A person, who has been duly appointed under 12 Car. 2, c. 24, s. 8, by the will of a father to be guardian of his child, stands in *loco parentis*, and having, therefore, a legal right to the custody of the infant, may, in order to obtain possession of such ward, claim a writ of *habeas corpus*, which a common law court has no discretion to refuse, if the applicant be a fit person and the child too young to choose for itself.

Where, however, the validity of the testamentary appointment is disputed, the court will direct an issue to be tried by a jury in order to establish the same.

MOTION for a rule calling upon Mary Fleetcroft to show cause why a writ of *habeas corpus* should not issue directing her to bring up the body of Mary Ellen Andrews, an infant, that the latter might be given over to the applicant as her testamentary guardian.

It appeared from the affidavits, that Thomas Andrews, being of the Roman catholic faith, entered into an ante nuptial arrangement with Ellen Fleetcroft, a protestant, whom he was about to wed, that, if there should be issue of their marriage, the males should be educated in the religion of the father, and the females in that of the mother. The intended marriage was solemnized on the 17th of March, 1854; and they had issue a son, who was baptized and brought up as a Roman catholic, and a daughter, Mary Ellen, the infant in question, who was born on the 22d of May, 1862. This daughter was, with the assent of her father, baptized a protestant on the 29th of June, 1862, having protestant sponsors approved by him.

On the 14th of February, 1863, the father executed, as was alleged, the following document, in the presence of two witnesses, who attested his signature: "I, Thomas Andrews, of Manchester, hereby direct that my children shall be baptized and brought up as members of the Roman catholic church, and in the event of my death, I hereby appoint my brother, Joseph Andrews, reporter, the guardian of my children, for the execution of this my request, giving him power, should he see fit, to appoint any other person, being a Roman catholic, as guardian of my *children, to act in case of his death, or [154 upon his ceasing voluntarily to discharge the duty, and to adopt any course which he may think proper for carrying out my intentions."

Two days afterwards, viz., on the 16th of February, Thomas

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Andrews died, possessed of no property whatever. His widow married again. The infant Mary Ellen from the time of her father's death was maintained, and educated by and at the expense of the defendant, Mary Fleetcroft, her grandmother, great affection existing between them. From the age of two years the child had been accustomed to attend a protestant church, and had been brought up in the principles of the protestant religion, without interference or objection on the part of any person, until the year 1871, when the applicant, Joseph Andrews, claiming under the alleged testamentary appointment, sought to have the custody of the infant that he might carry out the wishes of her father, and he caused her to be sent to a Roman catholic school, from which, however, she was afterwards withheld by her grandmother.

The defendant denied the validity of the testamentary paper, and contradictory affidavits were filed by the parties.

Jan. 14. *C. Russell*, Q.C., in support of the motion. The applicant is entitled to the child. He is her lawful guardian designated in a will, which, purporting to have been duly executed and attested, is valid as a testamentary appointment under 12 Car. 2, c. 24, s. 8, ⁽¹⁾: *Ex parte The Earl of Ilchester* ⁽²⁾. The court [55] has *no discretion to refuse him the writ: *Rex v. Isley* ⁽³⁾. Assuming an ante-nuptial arrangement to have been made such as is suggested, it would nevertheless be revocable, and was revoked by the will. The guardian, who now seeks to carry out the last wishes of the father, is acting *bonâ fide*, and has been guilty of no laches in waiting until the infant should be of an age at which she might receive instruction. As she is only nine years old, her ideas on religious subjects are not yet fixed, and, therefore, will not be disturbed by the change of tenets.

⁽¹⁾ 12 Car. 2. c. 24. s. 8, enacts that "where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children. . . by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time as he shall respectively thinke fitt to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remaine under the age of twenty-one yeares, or any lesser time, to any person or persons in possession or remainder, other than popish recusants, and that such disposition of the custodia

of such childe or children . . . shall be good and effectual against all and every person or persons claiming the custod or tuition of such childe or children as guardians in socage or otherwise; and that such person or persons to whom the custody of such childe or children hath bene or shall be soe disposed or devised as aforesaid, shall and may maintaine an action of ravishment of ward or trespassse against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such childe or children, and shall and may recover damages for the same in the said action for the use and benefit of such childe or children."

⁽²⁾ 7 Ves., 348.

⁽³⁾ 5 A. & E., 441.

O'Malley, Q.C., showed cause in the first instance. This testamentary paper, having no reference to property, has not been admitted to probate, and therefore the validity of the execution is doubtful. There is evidence of an agreement before marriage between the parents of the child, which the court will not disregard. To suppose that this will is a genuine document, is to conclude that the father, when dying, practised a fraud upon his wife by setting aside the ante-nuptial engagement which she, on her part, had performed, he himself having deliberately assented to the baptism of the child in the protestant faith. No attempt has been made to act upon the will for eight years.

[COCKBURN, C.J. Nevertheless, assuming its validity, have we discretion to refuse our writ to the guardian?

C. Russel, Q.C., mentioned *Re Meades* ⁽¹⁾ in which Lord O'Hagan, C., speaking of an ante-nuptial engagement similar to that relied on in the present case, said: "But that engagement was not of binding force: *Re Browne* ⁽²⁾."

COCKBURN, C.J. Possibly not; but does not the fact of its being morally binding give us a discretion here?

That fact ought surely to give the court discretion. There is a distinction between the action of the court in restoring a prisoner to liberty, and in giving up a child to a guardian. The Court of *Chancery would, under the present circumstances, disregard the direction in the will: *Hill v. Hill*. ⁽³⁾ In *Rex v. Isley* ⁽⁴⁾ the judges of the Queen's Bench assume their right to refuse the writ, Lord Denman, C.J., saying "... we should not consider our discretion tied up if there were a reasonable prospect of an order of the Court of Chancery being obtained."

[COCKBURN, C.J. But they acted on the testamentary appointment nevertheless.]

Reg. v. Clarke ⁽⁵⁾ is the leading case on the question of common law jurisdiction over the matter.

[COCKBURN, C.J. The act of Charles II. places the guardian in *loco parentis*, enabling him to come to us as the father would and to demand the child. If it would be no answer to the father that he arranged otherwise by a settlement, then it is none to the guardian. We will look into the authorities, and if we find discretion left to us we shall exercise it.

C. Russell, Q.C., referred the court to *Rex v. Greenhill* ⁽⁶⁾; *Re Hakewill* ⁽⁷⁾.
Cur. adv. vult.

⁽¹⁾ 5 Ir. Rep. Eq., 98, 111.

⁽²⁾ 2 Ir. Ch., 151.

⁽³⁾ 31 L. J. (Ch.), 505.

⁽⁴⁾ 5 A. & E., 441.

⁽⁵⁾ 7 E. & B., 186; 26 L. J. (Q.B.), 169.

⁽⁶⁾ 4 A. & E., 624.

⁽⁷⁾ 12 C. B., 223.

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Feb. 5. The judgment of the court (COCKBURN, C.J., MEL-
LOR, LUSH, and ARCHIBALD, JJ.) was delivered by

ARCHIBALD, J. We postponed giving judgment in this case in order that we might consider the authorities bearing upon the question whether, assuming the validity of the document appointing the applicant guardian, we have any discretion, under the circumstances, to refuse the writ of *habeas corpus* or to decline to change the custody of the infant.

The affidavits furnish evidence that before marriage an arrangement was made between the parents of the infant (the father being a Roman catholic and the mother a protestant) that the sons of the marriage should be brought up as Roman catholics and the daughters as protestants, and for the purpose of our judgment, but without intending in any way to prejudice the inquiry we are about to direct, we assume that such an arrangement was in fact made.

157] *It also appeared that the child, now about ten years of age, was, with the sanction of the father, baptized as a protestant; that when she was about a year old she was left, where she now is, in the custody of her maternal grandmother, by whom she has been brought up in the protestant faith, and at whose expense she has hitherto been maintained and clothed.

The father died on the 16th of February, 1863, having, as alleged, executed, two days before his death, a document purporting to appoint Joseph Francis Andrews guardian of his children, and sufficient, if duly executed, to constitute him guardian under the provisions of the statute 12 Car. 2, c. 24.

There is considerable doubt upon the affidavits as to when the appointment was first brought to the notice either of the mother or grandmother of the child; but it does not appear that any claim to the custody of the child was ever made by the applicant until the year 1871, about eight years after the father's death, and after the child had been left in the care of her grandmother, and maintained and educated at her expense for about the same period. The question which arises is, whether, as a court of common law, we can give any effect to the arrangement made before marriage with respect to the education of the child, and treat it as binding on the guardian who stands Com. Dig. Guardian (D) in *loco parentis* the admitted object of the present application being, that the child shall henceforth be brought up in the religious faith of the father; or whether we can decline to interfere with the present custody of the child, on the ground suggested that the change proposed would be prejudicial to her interests. In dealing with questions of this nature the Court of Chancery, exerting the prerogative of the sovereign as *parens patriæ*, has assumed a more extensive au-

thority than that exercised by the common law courts, and although that court, in making any order as to the custody or education of an infant, pays in general the utmost regard to the rights and wishes, or assumed wishes of the father as to the custody and education of his child (*Ex parte Skinner* ⁽¹⁾, *Hawksworth v. Hawksworth* ⁽²⁾), still, in carrying out what was conceived to be the true interest of an infant, an arrangement similar in effect to that in the present case was upheld by that court. *In the case of *Hill v. Hill* ⁽³⁾, a Roman catholic, who lived [158 until his eldest child was seven, and had allowed the mother, a protestant, to have exclusive charge of the education of the children during his life, and they with his full knowledge were brought up in the protestant faith, was held to have abdicated his right to direct their religious education, and in ordering a scheme to be settled for their education the court disregarded a direction in his will that they should be brought up in the Roman catholic faith.

The courts of common law, however, have always declined to give effect to any mere arrangement or consent on the part of the father disposing of the custody of his infant child, and have felt bound notwithstanding, to enforce the right of the father when asserted.

In the case of *Reg v. Smith* ⁽⁴⁾, it was held by Erle, J., in the Bail Court, that a contract, by the father of a child with a third person that the latter should have the custody of the child, was in the nature of a mere consent and might be revoked by the father, and that he was entitled by a *habeas corpus* to have the child delivered over to him.

Indeed, it appears to have been the invariable practice of the common law courts on an application for a *habeas corpus* to bring up the body of a child detained from the father (and the case would be the same as to a testamentary guardian) to enforce the father's right to the custody, even against the mother, unless the child be of an age to judge for itself, or there be an apprehension of cruelty from the father, or of contamination, in consequence of his immorality or gross profligacy.

If the infant be of an age to elect for itself, the court will merely interfere so far as to get it free from illegal restraint without handing it over to anybody. This was the course adopted in *Rex v. Delaval* ⁽⁵⁾, in the case of a girl eighteen years of age, who was delivered from a custody considered illegal, and left at liberty to go where she pleased. But in the absence of any right of choice, the court goes further, and transfers the infant to the proper legal custody.

⁽¹⁾ 9 I. B. Moore, 278.

⁽²⁾ Law Rep. 6 Ch., 539.

⁽³⁾ 31 L. J. (Ch.), 505.

⁽⁴⁾ 22 L. J. (Q.B.), 116.

⁽⁵⁾ 3 Burr., 1435.

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159] *The right to such an election, it has now been clearly decided, depends upon age alone, and not on mental capacity : see *Reg. v. Clarke* ⁽¹⁾, and it may be taken as settled that no such choice can be made, at all events by a female infant under the age of sixteen : *Reg. v. Howes* ⁽²⁾, followed by the Court of Probate and Divorce, in the cases of *Carlidge v. Carlidge* ⁽³⁾ and *Mallinson v. Mallinson*. ⁽⁴⁾

The principle on which this court acts in handing over to the parent or guardian an infant too young to make a choice as to its custody, is well explained by Coleridge, J., in *Rez. v. Greenhill*. ⁽⁵⁾ He says, "Where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that, where the legal custody is, no restraint exists : and where the child is in the hands of a third person, that presumption is in favor of the father. But although the first presumption is that the right custody, according to law, is also the free custody, yet if it be shown that cruelty or corruption is to be apprehended from the father a counter presumption arises."

These views were adopted and acted on by this court in the subsequent case of *Rex v. Isley* ⁽⁶⁾, where upon a *habeas corpus* obtained by testamentary guardians appointed by the father's will, two children, too young to make choice for themselves, were removed from custody of the grandfather and grandmother, and directed to be handed over to the guardians although the grandparents had, at the request of the father, on the occasion of his wife's death, come over from America at considerable inconvenience and sacrifice and settled in England, for the express purpose of taking care of the children, who had continued under their care for a period of about four years.

The same rule as to the paramount right of the father in the view of a court of common law, was also strongly expressed by the Court of Common Pleas in the case of *Re Hakewill* ⁽⁷⁾, and 160] *fully approved by this court in the case of *Reg v. Clarke* ⁽¹⁾, already cited. It is with great regret, that we therefore feel ourselves bound to hold, that, assuming the validity of the guardian's appointment, and notwithstanding the lateness of the application, and the apparent harshness of such a proceeding towards the grandmother of the child, we have no discretion to refuse the writ, and we should be bound to hand over the child to the custody of the guardian, as the only custody legally free from restraint.

⁽¹⁾ 7 E. & B., 186 ; 26 L. J. (Q.B.), 169.

⁽²⁾ 3 E. & E., 332 ; 30 L. J. (M.C.), 47.

⁽³⁾ 2 Sw. & Tr., 567 ; 31 L. J. (P. & M.),

⁽⁴⁾ Law Rep., 1 P. & M., 221.

⁽⁵⁾ 4 A. & E., 621, at p. 643.

⁽⁶⁾ 5 A. & E., 441.

⁽⁷⁾ 12 C. B., 223.

The affidavits, however, disclose circumstances which give rise to doubts as to the validity of the document by which the applicant was appointed, and as we cannot undertake to decide that question upon the affidavits, we have come to the conclusion that an issue must be directed, and that question submitted to a jury.

Rule accordingly.

Attorneys for applicant: *Chester, Urquhart & Co.*

Attorneys for respondent: *Nisbet & Co.*

The question as to whether the guardian or the grandmother should have the custody of this child subsequently arose in Chancery. (*Andrews v. Salt*, 21 Weekly Rep., 431.) when Vice Chancellor Malins held that "a contract entered into before marriage that the daughters should be brought up in the religion of the mother, should override a subsequent testamentary document appointing a guardian and authorizing him to bring up the child in the religion of the father, but of which document no notice was taken by the guardian for eight years, during which time he allowed the daughter to remain with her relations," and the guardian was restrained from prosecuting his writ of *habeas corpus*. On appeal to the chancellor this order was affirmed, (*Andrews v. Salt*, 21 Weekly Rep., 616). On the appeal witnesses were examined and cross examined. The lords justices held:

1. That the agreement was not legally binding.

2. That a father has a right during his life and after his death, to have his children educated in his own religion and that the court could not interfere merely on the ground that the children might be happier and better provided for by their mother's relations.

3. That this right could be waived, and in this case had been waived by the father, and afterwards by the guardian, the agreement being of weight in determining this point, and that this right having been waived, and it being better for the daughter that she should continue in the care of her mother's relations, the motion must be allowed."

It would be manifestly impossible within the limits of such a note as could be here inserted to give the cases in each of the states relating to the custody of children. Much conflict would be found and in many of the cases it would be found that the courts have very imperfectly understood and in many cases

failed to apply the rules which govern courts of equity. Without attempting to give or review many cases, it is proposed briefly and cursorily, to consider the subject under the following heads.

1. The rights of the father, in England, at law, during his life.

2. His rights in the United States.

3. The rights of the mother at law.

4. The rights of the father and of the mother, in equity, during life.

5. The right of the father to dispose of the custody of his children by testamentary appointment of a guardian.

6. Their respective rights during the pendency of proceedings for divorce.

7. The method of procedure to obtain the custody of a child at law, and in equity.

8. To whom application may be made at law.

9. To whom application may be made in equity.

10. Where application may be made during the pendency of proceedings for a divorce.

11. How far the courts will actively interfere to deliver the custody of a child.

12. How far a parent may, by agreement, surrender the right to the custody of infant children.

13. The right of a parent to access to children though not entitled to custody.

14. Upon whom the duty of support devolves in cases where the custody is given to the mother.

1. The rights of the father in England, at law, during his life.

As between the father and the mother the father, after the child had reached an age where the personal care of the mother, was not necessary for its preservation and existence was entitled to the custody of their child. *Mercein v. The People*, 25 Wend., 64, 72; 2 Kent. Com. 193, 194. Forsyth's Custody of Infants 10, 11; *Commonwealth v. Smith*, 1

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Brewster (Pa.) Rep., 547; *People v. Olmsted*, 27, Barb., 9.

And so far was this rule carried that in *Rez v. Greenhill*, the Common Law Courts held (4 Ad. & Ellis 624, 31 Eng. C. L. Rep. S. C. 6 Neville & Manning 244.) that where the father had formed an adulterous connection, which still continued, but it did not appear that he had ever brought the adulteress to his house or into contact with his child, and did not intend to do so, he was, as against the mother, entitled to the custody of their child. The court however conceded, that even at Common Law where there was danger that the child would be brought into contact with the father's mistress, or its morals contaminated by him or by those with whom he brought it into contact, that its custody would not be awarded to him, and such was conceded to be the law in *Mercin v. People* (25 Wend. 73, 75). Substantially the same doctrine had previously been laid down. *Bull v. Bull* 12 Simons, 35. The case *Rez v. Greenhill* appeared to have gone back to the principles of a semi-barbarous age when the wife was the slave of the husband, because he had the physical power to control her and when the rule of the strongest party constituted the rule of right." (Per Walworth, Chancellor, 25 Wend., 93).

The law as declared in this case was so shocking to the moral sense of the British Public, "that Sergeant Talfourd, to his everlasting honor, although he had been the counsel for the husband, immediately brought a bill into parliament to change the law and restore the mother to her natural rights, to be put upon an equality with her husband in relation to the care and custody of her children, within the age of nurture, and finally succeeded in carrying his bill through both houses of parliament by a large majority, though it was once defeated in the House of Lords." Per Walworth, Chancellor, 25 Wend., 64. Hurd's Habeas Corpus, 472.

Mr. Forsyth observes, that, during the debate in the House of Lords July 18, 1839, on the custody of infants bill, Lord Denman, Chief J. said of the case of *King v. Greenhill*, which had been decided in 1836, before himself and the rest of the judges of the court of King's Bench, "he believed that *there was not one judge who had not felt ashamed of the state of the law, and that it was such as to render it odious in the eyes of the country. The*

effect in that case was to enable the father to take his children from his young and blameless wife and place them in charge of a woman with whom he cohabited." See also 25 Wend., 93, 105. Hurd's Habeas Corpus, 473.

Lord Lyndhurst said, that, "by the law of England, as it then stood, the father had an absolute right to the custody of his children, and to take them from the mother. However pure might be her conduct, however amiable, however correct in all the relations of life, the father might, if he thought proper, exclude her from all access to the children, and might do this from the most corrupt motives. He might be a man of the most profligate habits, for the purpose of extorting money, or in order to induce her to accede to his profligate conduct, he might exclude her from all access to their common children, and the course of the law would afford her no redress; that was the state of the law as it then existed; need we say that it was a cruel law, that it was unnatural, that it was tyrannous, that it was unjust?" See also 25 Wend., 104-5.

Mr. Forsyth, (Forsyth's Custody of Infants 11-12), in speaking of this doctrine says: "It must be admitted that the application of this law which enforces with such zealous care the rights of the father, has often been extremely harsh. He might be a man of the most immoral character, and his conduct towards the mother such as to render it impossible for her, without all sacrifice of dignity and self respect, to live with him; and yet, provided only that he was cautious enough not to bring his children into actual contact with pollution, and did not physically ill treat them he had the entire control over and disposition of them, and might embitter the life of the mother by depriving her of the society of her offspring. And what untold suffering might she not be called upon to endure, in the mental struggle between the affection which prompted her to submit to insult and injury for their sake, and the desire to escape from such usage by abandoning her home."

By the English statute (chap. 54, 2 & 3 Vict.), before referred to it is provided.

"1. That it shall be lawful for the lord chancellor and the master of the rolls in England, and for the lord chancellor and the master of the rolls in Ireland, respectively, upon hearing the petition of the mother of any infant or infants being in the sole custody or con-

trol of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just.

* * *

"4. Provided always, that no order shall be made by virtue of this act whereby any mother against whom adultery shall be established, by judgment in an action for criminal conversation at the suit of her husband, or by the sentence of an ecclesiastical court, shall have the custody of any infant or access to any infant, anything herein contained to the contrary notwithstanding."

It will be seen that this statute does not apply to the common law courts but only to the lord chancellor and the other equity judges. Hence the decision by the Court of Queen's Bench in the principal case and the necessity of resorting to Chancery for relief against the same.

The English Courts of Equity promptly and vigorously came up to the views of parliament in protecting mothers from the tyranny of their husbands. Thus in *Ward v. Ward* (2 Phillips, 786) where nothing but profaneness, drunkenness and bad temper were charged against the husband, Lord Chancellor Cottenham said in 1849 (pp. 787-8) "The object of the act and of the promoters of it, and that which I think appears upon the face of the act itself, was to protect mothers from the tyranny of those husbands who ill-used them. Unfortunately, as the law stood before, however much a woman might have been injured, she was precluded from seeking justice from her husband, by the terror of that power which the law gave to him of taking her children from her.

That was felt to be so great a hardship and injustice, that parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife without the risk of any injury

being done to her feelings as a mother. That was the object with which the act was introduced, and that is the construction to be put upon it. It gives the court the power of interfering, and when the court sees that the maternal feelings are tortured for the purpose of obtaining anything like an unjust advantage over the mother, that is precisely the case in which it would be called upon and ought to interfere. When the parties, therefore, are considering the suggestion which I have thrown out, I wish them to bear in mind that this is not, as was the case in *Wellesley v. The Duke of Beaufort* (2 Russell 1) a question merely as to the general jurisdiction of this court to interfere with the legal rights of the father; but that I have now an absolute authority over the children under seven years of age, and a larger power than the court then had with regard to children above that age."

The case stood over to see whether the parents could arrange the matter, but not having done so, the chancellor afterwards awarded all the children to the mother, saying, among other things (p. 789) "Children are by nature entitled to the care of both their parents; but when the conduct of one or both the parents has been such, as to render it impossible that they can live together, and the court has therefore the painful duty cast upon it of deciding whether the children shall be brought up by one parent or the other, all that I can do is to adopt that course which seems best for the interests of the children, without regard, so far as it interferes with that object, to the pain which may be inflicted on those who are the authors of the difficulty * * I should have been glad if the husband had enabled me to dispose of the case in private, because the children are interested in concealing, as much as possible, the misconduct of either of their parents. But as he has from time to time published parts of these proceedings, it is due to the other parties concerned, that I should state the grounds of the order which I propose to make in public.

In *Shelly v. Westbrook* (1 Jacob's Ch. Rep., 266) the main ground on which the court proceeded was the impiety and the irreligion of the father: but the case which establishes the principle upon which I am about to act, beyond all doubt, was that of *Wellesley v. the Duke of Beaufort*, (2 Russell 1). There was in that case profligacy, adultery, profaneness, a great deal of which is to be found

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in the present case; and Lord Eldon expressed his opinion without hesitation that it was both the right and duty of the court to remove the children from the contamination to which they were exposed from such an example. I think it my duty to adopt the same course in the present case as regards the eldest child, (11 years old) who, being a daughter, is, both from her sex and her age, more likely to be affected by what passes before her, and who, therefore, requires the greater care. Whether I should have made the same order with respect to the eldest son (a year or two younger, to wit, 9 or 10), if his case had stood alone, it is not necessary to consider, because when I am compelled on such ground to take one child from its father, I must not accompany that measure with the great danger and evil to the children, of separating one portion of the family from another, separating them not in fact only but in feeling, for if one child were to be brought up by the father and the other by the mother, that very circumstance would create factions in the family, which it is the bounden duty of the court as far as possible to guard against. As to the other children, who are under seven years of age, the court has an *absolute* control over them, without regard to the peculiar common law right of the father to the custody of all his children. I think that is the true construction of the act, but whether it be so or not, the principle to which I have adverted with respect to the second child would apply equally to the other two, and as I am obliged to remove one I must remove all. * * The order, therefore, which I shall make, will be that the children now in the custody of the father be delivered to the mother, she and her brother undertaking to maintain them until further order. I see that in some cases, and amongst others, in that of *Shelley v. Westbrook*, that has been accompanied by a restraint on the father from applying for a *habeas corpus*, as otherwise the order might be reversed by a judge at common law." On Mr. Stuart, counsel for the mother, saying he desired the father to be so restrained, the chancellor said, "Let it be so."

The court for Probate, Divorce and Matrimonial causes, has been equally decided as to the right of the mother to the custody of the children when she was the innocent party.

In *Barnes v. Barnes* (L. R. 1 Probate and Div., 463), the Judge Ordinary

awarded the children to the mother saying: "I think this application should be granted. It is distinguishable from *Carlidge v. Carlidge* (2 Sw. and Tr. 567; 31, L. J. P. M. and D., 85). The children in this case are both of tender age; they are not living with their father and it is clear that the mother's health has suffered from being deprived of their society. No doubt the father is at common law, entitled to the custody of the children. But here they are not under his roof as in *Carlidge v. Carlidge*, he does not enjoy the solace of their society, and that case clearly excepted the state of things now before this court. The order must go as prayed, the father to have access to the children once a fortnight."

In *Milford v. Milford* (L. R. 1 Prob. and Div., 715), the judge ordinary said: "I am clear that I cannot take the children from their mother to hand them over to the father's family. The wife has been wholly blameless in this matter, and has done nothing to forfeit her natural right to have possession of her children, whilst the husband has been proved to have led a life of profligacy at Exeter, by reason of which she has obtained a judicial separation from him. As to the children, therefore, the court will not make an order in favor of the party by whose fault the common home was broken up, and they have been deprived of their parents."

The court will never place the control of the children, who are girls, in the hands of such a man." The court then proceeds to order that the husband pay the wife 30 pounds per annum, towards the support of the children.

2. The father's rights in America.

This cruel feature of the law of England had not at the time of our revolution been carried so far. (*Mercein v. The People* 25 Wend., 104). It should be observed however, as is said by Hurd, in speaking of the English case which led to Sergeant Talfourd's act above referred to: "It is gratifying that the American Reports furnish no such case as that of *Rex v. Greenhill*, to make the judges "ashamed of the law." Hurd's *Habeas Corpus*, 474.

Mr. Hurd reviews the American cases and shows that much greater liberality had been allowed mothers by the American Courts than by those of England. No one can read this review (pp. 474-521) without agreeing with Mr. Hurd, that "the Courts in America have followed steadily and persistently public sentiment in awarding the custody of

children to the mother, wherever the father by immoral conduct or otherwise has driven his wife from his roof."

In addition to the cases cited by Hurd the books are full of similar cases and authorities. "This state has never been disgraced by laws so subversive of the welfare of infant children, of the rights of mothers and of the morals of the people." *Mercein v. People* 25 Wend., 105.

In *Putnam v. Putnam* (3 Code Rep., 122), the court awarded the custody of the child to the mother, during the pendency of a divorce suit, although the father absolutely denied that he had ever committed adultery.

In *Codd v. Codd* (2 Johns. Chy., 141), the same order was made by the Court of Chancery.

In *Barrere v. Barrere* (4 Johns. Chy., 187), where a divorce for cruelty only was granted, the custody of the child was given to the mother. The husband had forfeited all right to the custody of the child, although the court said (p. 190), the mother may not have been always discreet before her husband, the court giving its reasons for so doing (p. 197), and awarding the mother an allowance for her support.

In the matter of *Holmes* (19 How. Prac. 332-4) the custody of the children was awarded to the mother.

In the matter of *Cuneen* (17 How. Prac. 516), the same disposition was made of the children.

In *People v. Wilcox* (22 Barb. 183-6) Mr. Justice Mason gives his reasons as to why he should do so, if it were not for the fact that the grand father had been appointed testamentary guardian and he could not do so, on a *habeas corpus at law*. The mother was awarded the custody of the children in *Cooke v. Cooke* (1 Barb. Chy., 639, although the chancellor said (pp. 646-7). "On the other hand the conduct of the mother previous to the divorce, if the affidavits of the defendant and some of his witness are to be credited, was such as to lead to a suspicion that she too was unfaithful to her marriage bed. But no one swears to anything amounting to certain or even *prima facie* evidence of guilt in this respect, although her imprudence was such as to induce some of her neighbors to distrust her. Since the divorce, however, there is nothing, to excite a suspicion that she has not conducted herself properly in this respect. The only charged against her since that time is, that she some-

times gives away to violent ebullitions of passion towards her present husband. But there is nothing to create a suspicion that the child had not been kindly treated and properly supported and cared for both by its mother and step-father for the two years and a half which it was allowed to remain with them, subsequent to the decree. On the contrary, it appears that the child, while she remained with them, was kindly treated, comfortably clothed and otherwise provided for and furnished with means of instruction suitable to her age. The vice chancellor was therefore right in awarding the custody of this child to the mother, and without reference to the agreement which was made previous to the divorce."

In *Cooke v. Cooke*, 1 Barb. Chy., 646; the husband did not deny the acts of adultery charged although he attempted to impeach the witness who swore to them. The chancellor says the affidavits lead to a suspicion that the wife too was unfaithful to the marriage bed. He nevertheless considered her guilt, if any, much less reprehensible than the husband's and gave her the custody of the children. See 2 Bishop, Mar. & Div., §§ 534-544.

In *People v. Mercein* (8 Paige, 47), the chancellor held (p. 56) that where parents were living in a state of separation, either with or without a legal divorce, authorizing a suspension of marital cohabitation, a summary inquiry into the merits and demerits of each may be necessary to enable the court to make a proper disposition of the infant children brought up on a *habeas corpus*. In that case many days were spent "in the investigation of the causes which led to the separation between the father and his wife," and the chancellor put his decision (pp. 66-70) upon the ground that Mrs. Barry, the mother, was for the present justified in her refusal to accompany her husband to *Nova Scotia*, and that she was not, therefore, living in a state of separation from him which could be properly considered illegal and immoral. No woman is obliged to cohabit with her husband, who is concededly in the constant habit of committing adultery with another woman, at the peril of losing the custody of her infant child, if she see fit to assert her rights. To give the husband the power to control its custody, whether he keep it himself or hand it over to another, even though unexceptionable, and thus

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coerce her into submitting to his outrages upon her rights, would be a mockery of justice which the court should promptly rebuke.

In speaking of the provisions of the statutes of New York, Nelson, Ch. J., says (*People ex Rel. Nickerson v. —*, 19 Wend., 18): "It may well be doubted, I think, whether this statute was intended to apply where the wife withdraws from the protection of the husband and lives separate from him *without any reasonable excuse*, because there the separation would be unauthorized and in violation of the law of the land. It was probably designed to remove the difficulty that existed at common law, in denying or restraining the authority of the father, in the case of an unauthorized separation, such as for ill-usage, or by consent, where no ground existed for impeaching that authority upon common law principles.

The legislature could not have intended that the court should ever award to the mother, the care and education of her minor children, when she had wilfully and without pretence of excuse abandoned her family and the protection of her husband, if he was in a situation to take care of them, and no *well founded objection existed in the case.*" See also *People v. Olmstead* 27 Barb., 9.

In the *United States v. Green* (3 Mason, 485), Judge Story, says: "As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right on the part of the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of its natural protector both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances and ascertain whether it will be for the real permanent interests of the infant, and if the infant be of sufficient discretion, it will also consult its personal wishes.

It will free it from all undue restraint, and endeavor as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute, vested right in the custody.

The case of the *King v. De Mannville*, (5 East 221) is not inconsistent with this doctrine: but on the other hand presupposes its existence. The court there thought it for the interest of the child to give the custody to the father. The judges thought there was no reason to suppose the father would abuse his rights or injure the child. Lord Eldon, in *De Mannville v. De Mannville*, (10 Ves. 52), avowed his approbation of the doctrine and said he had, exercising the authority of the king *parens patriae*, removed children from the custody of the father, when he thought such custody unsuitable. The case of *In re Waldron* (13 Johns. Rep. 419) is directly in point, and to the same effect is the *King v. Smith*, (2 Strange 982. My judgment follows these cases without hesitation."

In Pennsylvania it has been held on *habeas corpus* that "The father has the first title to guardianship by nature, but this is subordinate to the mother's right while the child is in tender infancy. His claim will, however, be disregarded, if his character and conduct render him unfit to be guardian. *Commonwealth v. Smith*, 1 Brewster, (Pa) Rep., 547.

In granting a divorce, the court has the power to decree the custody of the minor children, or any of them, to the party most suitable, considering the sex and age of the children and qualifications of the parties. When there is property it is the duty of the court to make reasonable provision for the support of the children. *Bush v. Bush* 37 Ind. 164, 166-8.

The American elementary treatises are equally clear as to the right of the mother to the custody of infant children where the father has been guilty of immoral conduct, warranting or authorizing his wife to separate from him. Thus Schouler in his recent work on Domestic Relations (pp. 339, 340), says:

"The English case of *Rex v. Greenhill* (4 Ad. & Ellis, 624), which, in effect, enabling the father to take his children from his blameless wife and place them in charge of a woman with whom he cohabited, hastened the passage of Justice Talfourd's act, has been repeatedly condemned in the United States. Indeed, our courts have required no such statutes to prevent them from taking the custody of any child from one whose parental influence is found to be injurious to the child's welfare; and if a father wrongs his wife, it is readily

presumed he will wrong his children likewise.

Bishop (2 Mar. & Div. (4th Ed.), § 532), says: "The proposition is generally true, that one who has conducted, either well or ill, in a particular domestic relation, will conduct the same in another; and so as a general practice, the courts give the custody to the innocent party: because with such party, the children will be more likely to be cared for properly."

Again he says (§ 533): "It has been considered that a single act of adultery would not, of itself, exclude a husband, absolutely and forever, from the care of his infant children if the court should be satisfied he had abandoned his licentious intercourse, becoming thoroughly reformed."

Even in limited divorces for cruelty, the children are usually awarded to the wife. 2 Bish. Mar. and Div. (4th ed.), § 337. *People v. Olmstead*, 27 Barb 9.

In New York as early as 1815 a statute was passed upon the subject (Laws 1815 p. 225) which was incorporated into the Revised statutes in 1830 (2 R. S. 148, 2 Edmonds' Stat. large 155), as follows:

§1. When any husband and wife shall live in a state of separation, without being divorced, and shall have any minor child of the marriage, the wife, if she be an inhabitant of this state may apply to the Supreme Court for a habeas corpus to have such minor child brought before it.

§2. On the return of such writ, the court on due consideration may award the change and custody of the child so brought before it to the mother for such a time, under such regulations and restrictions and with such provisions and directions as the case may require.

§3. At any time after the making of such order the Supreme Court may annul, vary or modify the same."

In speaking of this statute the Supreme Court said (*People v. Brookes* 35 Barb. 88-9.)

"It may be admitted that notwithstanding this beneficent power (the equitable powers of a court of equity) vested in the courts and liberally and wisely exercised as it has been for the benefit of infants, cases of extreme hardship have resulted from the jealous care with which at common law the rights of a father are enforced. A man of the most immoral character, whose conduct towards the mother is such as to render it impossible for her without sacrificing

her dignity and self respect to live with him, may yet be so cautious as not to bring his children into actual contact with pollution, or to ill-treat them physically, and thus imbitter the life of the mother by depriving her of the society of her offspring (*Ball v. Ball* 2 Sim. 35) Forsyth's Custody of Infants, 28, et seq.

In the revision of the statutes of this state in 1830 a remedy was provided for these exceptional cases of hardship. It was enacted that when any husband and wife should be in a state of separation without being divorced, and should have any minor children of the marriage, the wife being an inhabitant of the state, might apply to the Supreme Court for a habeas corpus to have such minor child brought before it, and on the return of such writ, the court might, on due consideration, award the charge and custody of the child so brought before it, to the mother for such time under such regulations and restrictions, and with such provisions and directions as the case might require and might at any time after the making of such order, annul, vary or modify it, (2 R. S., 148 §§ 1, 2, 3). The child being before the court upon a habeas corpus directed to the mother and issued at the suit of the father, in the assertion of his common law rights would give the court jurisdiction over the parties and the subject matter, and authorize an adjudication under this statute. This statute does not declare on what grounds the court shall proceed, but confides the whole matter to its discretion and hence the occasion, cause and circumstances of the separation and the relative merits and demerits of the parties may be taken into account (*People v. Chagary* 18 Wend., 637)."

In *People v. Chagary* (18 Wend., 643), the court, in speaking of this statute, said: "The statute under which the writs in this case were issued seems to have been suggested by the practice of the English Court of Chancery, which has been mentioned. It has conferred on this court the power which it did not before possess of interfering between the husband and the wife in relation to the charge and custody of their minor children. The children may, under certain circumstances, be committed to the mother for such time under such regulations and restrictions and with such provisions and directions as the case may require' (§ 2). I have entertained some doubt whether this was a

proper case for consulting the children in relation to their wishes. This is not a proceeding for the purpose of relieving them from any improper restraint; but it is a contest between parents in relation to the future charge and custody of their children. But as the legislature has not declared on what grounds the court shall proceed, but has confided the whole matter to our discretion, I have concluded that it was not improper to consult the children, and have conversed with them severally in relation to their present condition and their wishes for the future."

The rights, of the father at law, in America, irrespective of statutory provisions, may then be laid down as follows: The general doctrine that the right of a father to the custody of his minor children is paramount to that of the mother, is well settled. He may forfeit that right by misconduct, or lose it by disqualification, and it may be suspended by reason of the tender age of the child and its welfare requiring that it be with the mother. But a strong case, must exist, to warrant the depriving him of this right, even for a limited period. Where the wife has separated from her husband without any sufficient excuse, she ought not to have the custody of the child, unless the health and present condition of the child imperatively require it. *People v. Chagary*, 18 Wend 637; *People v. Humphrey*, 21 Barb. 521; *People v. Brookes* 35 Barb. 89-95. *People v. Mercein*, 3 Hill 412-415; *People v. Mercein*, 8 Paige, 54, 57. But whenever the mother has just cause for leaving the father or living separate from him the custody of the children will, unless there be good reasons to the contrary, be awarded to her, as the innocent party. *People v. Olmsted*, 27 Barb. 9, and authorities before cited.

But the mother must not have lightly, or for insufficient causes have left her husband. In *Curr v. Carr*, 22 Grattan, 168, the husband was coarse, petulant, close, exacting, penurious and rude and dictatorial in his speech to his wife, exacting in his demands upon her and sometimes unkind and negligent in his treatment of her, even when she was sick and worn and weary in watching and nursing their sick child, leaving her to bear alone burdens and trials which it should have been his highest pleasure to share and to relieve. She, on the other hand, was quick to feel his treatment, not very patient to bear it,

nor with the self denial to endeavor to accommodate herself to his disposition, and wishes. The husband had written her three letters urging her to return. In the last he said "that from the day she left him, then three nearly years, to the present time, there had been no hour in which he would not gladly have taken her back to his home and his heart. That the time was near at hand for the hearing of their case and beseeched her to come back and let him prove to her that he can and will be her loving and devoted husband. The wife replied, refusing to return and evidencing that she was still smarting under the ill-treatment she at least considered she had received. The case does not show but that the mother's health at the hearing was good. The wife left the husband taking their child, three years old. The husband brought suit in equity for a divorce *a mensa et thoro* on the ground of the desertion of the wife and moved for the custody of the child. The Circuit Court rendered judgment for a divorce, which on appeal, was modified by a provision that it should be absolute unless the wife returned to the husband with the child within six months. The Circuit Court, in speaking of the custody of the child, said (pp. 174-5)," Nor did the court err in awarding the infant daughter to the custody of her father. The child was three years old at the date of the decree of the Circuit Court, and is now four. The tender nursing period has passed by, and the time for moral training and impressions has arrived: and the court must decide whether there is anything in the circumstances of this case which, having in view the good of the child, renders it necessary and proper that it should remain longer with the mother. We think not, but the reverse. We concur with the learned judge of the Circuit Court when he says, that she has 'too lightly abandoned duties which she was bound by religion, morals and the laws of society conscientiously to perform.' For matters which, however painful and annoying at the time, are not of infrequent occurrence in early married life, and are, at most, of comparatively small importance, she has undertaken, of her own accord, to disregard and sever the sacred bond of marriage, 'the prop and bulwark of the social system,' and to throw herself upon society, as was said by this court in *Bailey v. Bailey*, 'in the undefined character of a wife without a

husband, burdened with disgrace; and we are asked to compel the father and deserted husband to allow his innocent and unoffending daughter to share with the mother this undefined, ambiguous position, this burden of disgrace, during the critical period of moral training and education, when the mother has neither a home to which to take her (except at sufferance) nor means whereby to maintain her."

3. The rights of the mother at law.

The mother, when the father has not been guilty of conduct justifying her separation from him has technically no right to the custody of their children.

Where, however, from the extreme youth of the child, from its delicate health, or for other adequate cause, it would be injurious to the child to separate it from the mother, the right of the father to take it from her has been "suspended." *People v. Humphreys*, 24 Barb., 523; *People v. Mercien*, 8 Paige 47, 70; Forsyth's Custody of Infants, 10-13; *Rez v. Greenhill*, 4 Ad. & Ellis, 624; *Mercien v. People*, 25 Wend., 80, 104-106; *Commonwealth v. Smith*, 1 Brewster (Pa.), 547.

But when the mother has not sufficient milk for the child or for any other reason it is apparent that the child will be as well cared for as by her the rule does not apply. *People v. Humphreys*, 24 Barb., 523.

And where the mother had been addicted to habits of intoxication the court would not commit the custody of a child to her although she had abandoned the habit until her abandonment had been tested by time and found complete. *Commonwealth v. Smith*, 1 Brewster (Pa.) Rep., 547.

What has been said under this subdivision does not apply to illegitimate children. The mother, as against the father, is, as a matter of law, entitled to the custody of such children. *Matter of Doyle*, Clarke's Chy., 154; *People v. King*, 6 Barb., 366; *Robalina v. Armstrong*, 6 Barb., 366; *People v. Mitchell*, 44 Barb., 245; *Ex parte Knee*, 4 Bos. & Puller, 148; *Matter of Lloyd*, 3 Man & Gr., 547.

Though the father as against every one except the mother is entitled thereto. *People v. Cooper*, 8 How., 238; Forsyth's Custody of Infants, 78-84.

4. The rights of the father and of the mother, in equity during life.

A court of equity has the inherent right, and it is its duty, to consult the

interest of the child and if it will be benefited by so doing will, as against the father, award the custody of the child to the mother or even to a stranger as against both father and mother. *Smith's Man. of Eq.*, 432, 1st Am. ed.; 2 St. Eq. Jur., § 1341 *et seq.*

In *Wellesley v. Duke of Beaufort* (2 Russell 1) Lord Chancellor Eldon held in 1827, before Mr. Justice Talfourd's act (1839), that the Court of Chancery had an inherent right to deprive a father who was guilty of adultery of the custody of his children. In that case the father had written (p. 17), "that a man and his children ought to go the devil if he pleased." Adding in a postscript, "that neither God nor the devil should interpose between him and his children." The wife immediately after that communication filed a bill in Chancery, (p. 18). Lord Eldon cites with approbation (pp. 21-22), the language of Lord Chancellor Macclesfield in *Duke of Beaufort v. Bertie*, (1 Peere Williams 103) when speaking of a claim of a testamentary guardian, appointed by the father under authority of the statute, that the court had no right to deprive him of the custody of the child. But it is above a century ago, since in the case of the *Duke of Beaufort v. Bertie*, the lord chancellor of that day, Lord Macclesfield, determined that the statute guardian was subject to all the jurisdiction of this court. The lord chancellor in effect said, "I will not place the statute guardian in a situation more free from the jurisdiction of this court than the father is in;" so that he applied the acknowledged jurisdiction over the father as a justification for interfering with the testamentary guardian. The former jurisdiction he stated as the acknowledged law of the court. And he went further, for he added: that if he had a reasonable ground to believe that the children would not be properly treated, he would interfere, upon the principle that preventing justice was preferable to punishing justice." The lord chancellor says (p. 80). "Nor is it necessary that I should give an opinion upon the subject of drunkenness, as there is no such imputation in this case. At the same time I have no difficulty in saying, that if a father be living in a state of habitual drunkenness, incapacitating him from taking care of his children's education, he is not to be looked upon as a man of such reason, and understanding as to

enable him to discharge the duty of a parent, and if such a case were to occur again as it has occurred before, the court would take care that the children should not be under the control of a person so debased himself and so likely to injure them. It does appear with reference to the evidence before me that there has been adultery to an extent about which nobody can doubt." Again (p. 34), "Let me say that the jurisdiction of the court extends to restrain altogether where it is necessary to do so; to modify that restraint so as to show that the sentiments of filial duty should be protected and cultivated in the children by those who have the care and custody of them; and to take off the restraint which it has imposed. But under the existing circumstances, is it proper that the girl should be placed under the care of Mr. Wellesley, while he has any connection with this woman, Mrs. Bligh? Certainly not." The determination of the chancellor was affirmed in the House of Lords. (2 Bligh, N. S. 124).

In an anonymous case (3 Simons, N. S., 54, 42, Eng. Chy. Rep., S.C., 11 Eng. L. & Eq. Rep., 231) the father, a clergyman, presented a petition setting out fully facts in which he claimed that the mother should, on *habeas corpus*, surrender their infant children to him. He had been indicted for an unnatural crime with a soldier, had been tried and acquitted, but the vice chancellor, (Lord Cranworth) said he could not resist the conviction that the father was in fact guilty.

The vice chancellor said, (2 Simons, 68: 11 Eng. L. & Eq., 290), "The ground for granting the writ of *habeas corpus* by this court is not the same as for a grant of it by a court of law. At law the issue of the writ is *ex debito justitiæ*, and in a sense it is so here, but the Court of Chancery has a jurisdiction respecting it, infinitely beyond that of a court of law. Although this is a petition asking for a *habeas corpus*, if I saw any way, which I do not, I could make a modified order respecting access. Under the circumstances of this case, whether I am to do anything or not, must depend on this question. Not whether I am perfectly satisfied of the prisoner's guilt, but whether I am satisfied he has so conducted himself as that I ought, upon the materials before me, to treat him as if he were a guilty man. Because, once suppose it to be estab-

lished that he is to be treated as a guilty man, the duty of the court is plain. No case has been cited before me to-day applicable to a case of this kind—at all applicable to the case at hand. When the court refuses to give possession of his children to the father, it is the paramount duty of the court to do so for the protection of the children themselves, and the court will perform that duty, if the father has so conducted himself that it will not be for the benefit of the infants that they should be delivered to him, or if their being with him will affect their happiness, or if they cannot associate with him without moral contamination, or if, because they associate with him other persons will shun their society. My opinion is that if it be established to my satisfaction, that the father of the children, from ten to two years of age, is to be treated by me as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children, even after he has escaped conviction. After reviewing the facts and circumstances tending to show the father would be and should be treated by decent people as if he were guilty, or at least should be strongly suspected of being so, the vice chancellor adds (3 Simons, N. S. 76; 42 Eng. Chy. Rep., 11 Eng. L. & Eq. Rep., 294): "I think the court ought to go a very great way, when the application is for the removal of children from the mother, to see that they are protected; and although the court will act for the benefit and protection of children, it will act in all respects with as favorable a feeling as possible towards the father, even when it refuses to give the children up to him. It is impossible, however, here not to see, that contact of these children with their father, implies utter exclusion of them from every one else. It is my duty to see that as his society (who I am bound to take as guilty of an unnatural crime in its most aggravated form) would contaminate them, they shall not be placed in any situation, shall not enter into any society, in which they may come into contact with him, or where he may have any chance of meeting them, and were the children with their father I should deem it my duty to remove them. * * *

The wife is greatly to be pitied: she is to be pitied that she must keep the existence of the father a matter of mystery

to her children, must keep him to their vision, as it were, in a mist. I do not entertain any doubt what course it is my duty to take. I never did entertain any doubt, after I had once satisfied my mind that I must deal with the petitioner as a guilty man. Believing him to be guilty, the custody of the children by him is out of the question."

Where the father and mother were of a sect called "Servants of the Lord," which taught that and acted upon the theory that the day of grace had passed and the day of judgment commenced, and that by reason thereof prayer was superfluous, and that no day of the week ought to be kept as a day of peculiar holiness, and the wife having manifested insubordination to the chief of the sect, was deserted by her husband who with the chief and others formed a new society called "Agapemone." Shortly after the desertion of the wife she was delivered of a boy, who remained in the care of his mother and maternal grandmother, at the residence of the latter, who properly provided for his maintenance and education: *Held* a proper case for restraining the father from acquiring possession of the infant. *Thomas v. Roberts*, 3 De Gex and Smale, 758.

The determinations of the courts in this country are to the same effect. In *People v. Brookes* (35 Barb. 87-8.) it was held that a court of equity may in its sound discretion, "When the morals or safety or the interests of the children require it, withdraw the infants from the custody of their father, and give them to the mother or place the care and custody of them elsewhere. This jurisdiction to remove infant children from the custody of their parents, and to superintend their education and maintenance, although one of extreme delicacy and responsibility is, nevertheless well established, and indispensable to good order and the just protection of society. It has been repeatedly exercised in this state, and has been acted upon for one hundred and fifty years in England, and was recently confirmed by the house of lords in *Wellenley v. Wellenley* (2 Bligh N. S. 124; S. C. 2 Russ. Rep., 20, 21.) The jurisdiction proceeds upon the theory that the right of guardianship is a trust for the benefit of the child, and the parent is not at liberty to abuse it. It is not important here to inquire in what cases and for what reasons the courts will interfere

with the parental control of infants. It is sufficient to say that the welfare of the child alone is considered by the court in the exercise of this jurisdiction. It acts only for the benefit of the infant, without regard to the feelings of the parents. (*De Mannville v. De Mannville*, 10 Vesey 52; *Ex parte Woolstonecraft*, 4 Joins Ch., 80; 2 Kents Com., 220."

In the case of *Wilcox v. Wilcox* (22 Barb., 178), the father being dead the mother first applied at law by a *habeas corpus* to compel the paternal grandfather to surrender to her the custody of her child which had for nearly eight years been in the custody of the father and the grandmother who had taken the child, owing to the mother's feeble health, when only a few weeks old, and had become very much attached to her. The grandfather made return to the writ of *habeas corpus* that he had been duly appointed guardian of the person of the child and this was held a valid defence *at law*. (22 Barb., 178, 193.) The mother then filed a petition *in equity*, praying that the custody of the child might be given to her (22 Barb., 193-5) and the court so ordered. In discussing the power and the duty of a court of equity Mr. Justice Mason said (22 Barb. 183-4), The interest of the child, however, must be the governing motive with the court, and whenever that is ascertained, the judgment of the court must be pronounced accordingly, irrespective of all other considerations." This order was affirmed at General Term and on appeal to the Court of Appeals it was there affirmed (14 N. Y. Rep., 575), the court laying down the rule that "A court of equity has jurisdiction and authority to take a minor child from a guardian appointed by the surrogate on the death of its father, and deliver it to the care and custody of its mother, when this is for the advantage of the child." The court (p. 578), said: "Although the grandfather procured himself to be appointed, by the surrogate, the guardian of the person and estate of the child, that does not control the power of the Court of Chancery to control its custody. The father is the natural and legal guardian of the child; still the court will, in a proper case, interfere even with his control. The motive to the exercise of this power is the benefit of the child, and is not to be defeated by one having a mere legal title to the custody of the child, any more than it would be defeated if the legal guardian should abuse his

trust. The Court of Chancery acted as the guardian of all infants, this was one of its most sacred, and most worthy and most important duties."

Where there is danger that the father may remove the child beyond the jurisdiction of the court, a court of chancery will commit its custody to a proper person and restrain him from doing so. *Creuze v. Hunter*, 2 Cox, 241; Forsyth's Custody of Infants, 135, *et seq.*

5. The right of the father to dispose of the custody of his children by the testamentary appointment of a guardian.

"Generally, in this country, the father may, by deed or will, dispose after his death, of the custody and tuition of his children under age." 2 Kent's Com., 205-6 marg. p.; *People v. —*, 19 Wend., 18.

And has the power, notwithstanding the protests of the mother, to commit its custody to a stranger. Forsyth's Custody of Infants, 109-110.

The mother however has no such power. Forsyth's Custody of Infants, 111.

And has no right to interfere with the guardian in respect to the custody or education of the child however amiable or refined she may be. Forsyth's Custody of Infants, 114-5.

Although the Court of Chancery has power to control his action in a proper case. Forsyth's Custody of Infants, 116-124.

This cruel relic of barbarism (created by statute, 12 Charles 2, Chap. 24) and in New York reenacted as late as 1830, (2 R.S., 156 §§ 1, 2, 2 Edm. St., 156), remained in existence until 1862 (Laws 1862, ch. 172, page 345, 4 Edm. St., 517) when it was modified by a provision that "no man shall bind his child to apprenticeship or service or part with the control of such child, or create any testamentary guardian therefor, unless the mother, if living, shall, by writing, signify her assent thereto."

In 1871 (Laws 1871 vol. 1, p. 39) the revised statutes were so amended as to give the mother, in case the father be dead and shall not have exercised his right of appointment, power to dispose of the custody and tuition of her minor children during minority, or for any less period, to any person or persons in possession or remainder.

6. The right of the father and of the mother, respectively, to the custody of

their infant children during the pendency of proceedings for divorce.

During the pendency of proceedings, for a divorce by one parent against the other the court has a right, as an incident to the principal relief to be granted, to determine which parent shall have the custody of an infant child pending the suit. *Cook v. Cook* 1 Barb. Chy., 644; *Burritt v. Burritt* 29, Barb., 127, 129; *Burnes v. Burnes* L. R. 1 Prob. and Div 463. And will usually, unless good reasons appear to the contrary, award the custody to the innocent party. *Barrere v. Barrere*, 4 Johns Chy. 196; and See, authorities before cited, and 2 Bish. Mar. and Div. §§532-8.

Provision is made in New York by statute, for determining which parent shall have the custody. 2 R. S. 148 §59; 2 Edm. St., 154.

7. The method of proceeding to obtain the custody of a child at law and in equity.

(a). The method of proceeding at law is by *habeas corpus*. Forsyth's Custody of Infants 17-18.

(b). In equity the proceeding is by petition. *Wilcox v. Wilcox*, 22 Barb., 193, affirmed 14 N.Y., 575. This leading case upon the subject of proceedings in equity should be examined before taking such proceedings. As the petition would not compel the production of the child pending the proceedings it would, in a case when its abduction is feared, or when immediate access by the petitioner is desired be advisable to apply for and obtain a *habeas corpus* ancillary to the petition. At the conclusion of the proceedings, upon the petition in equity, the court may order that the care and custody of the infant be awarded and committed to the petitioner and that such infant be delivered over by the respondent to the petitioner there to remain until the further order of the court. *People v. Wilcox*, 22 Barb., 194 affirmed 14 N.Y., 575.

8. To whom the application may be made at law.

The application for a *habeas corpus* may be made to any court having common law powers. In New York it may, by statute, in most cases be made to certain other officers.

In case however the contest be between the father and the mother the statute expressly directs that the writ shall be granted by the court. 2 R.S., 148 §§1, 2, 3; 2 Ed. St., 155; *People v. Humphreys*, 24 Barb., 521, 524; *Rising*

v. *Dodge*, 2 Duer., 48; *People v.*——, 19 Wend., 18.

The petition, if by the mother, should show her ability to provide for the child and the pecuniary condition of the father. *People v. Manty*, 2 How. Prac., 61-2; *Rising v. Dodge*, 2 Duer., 49.

The court will, in such case, refuse to make an order requiring the mother to deliver a child to the father on a state of facts being shown which might induce the Supreme Court to take it from the father and award it to the charge and custody of the mother. *Rising v. Dodge*, 2 Duer., 48; *People v. Mercein*, 25 Wend., 73.

The question may be determined upon affidavits. *People v. Chegary*, 18 Wend., 642; *People v.*——, 19 Wend., 19; *People v. Brookes*, 35 Barb., 85.

Or the court may hear the proofs offered by the parties. *People v. Brookes*, 35 Barb., 85, 93-4. Which after issues are completed, on *habeas corpus*, is summarily given.

It should be borne in mind that the English cases upon a common law *habeas corpus*, relative to the custody of infants are not applicable to the statutory writ in this country. *People v. Cooper*, 1 Duer., 709.

9. To whom application may be made in equity.

Application may be made by petition in equity to the court or to a judge at Chambers out of term. *People v. Wilcox*, 22 Barb., 179, 14 N. Y., 575.

10. To whom application may be made during the pendency of proceedings for a divorce.

Except where by statute (as in New York as before shown), power is given to proceed by *habeas corpus* the application should be made to the court in which the suit is pending. It exercises the power as an incident to the suit.

11. How far the courts will actively interfere to deliver the custody of a child. It has been held that the court is bound *ex debito justitiæ* to set an infant free from an improper restraint but it is not bound to deliver it over to any person nor to give him any privilege. *Rez v. Duval*, 3 Burrows, 1436; *Mercein v. People*, 25 Wend., 73, 104; *Commonwealth v. Smith*, 1 Brewster, 547; *Rising v. Dodge*, 2 Duer., 48; *People v. Cooper*, 1 Duer., 709.

But it may determine into whose hands its custody ought to be committed. Forsyth's Custody of Infants, 58; Hurd on Habeas Corpus, 530-2.

Especially if the child be of tender age and unable to determine for itself with whom it will go. *People v. Cooper*, 8 How. Prac., 288; *People v. Mercein*, 25 Wend., 73, 104; *Rising v. Dodge*, 2 Duer., 48.

And will, in a proper case, interfere to enforce that right and deliver up the infant to the proper and legal custody. Forsyth's Custody of Infants, 71-4; *Rex v. Lucy*, 5 Ad. & Ellis, 441; *People v. Cooper*, 8 How., 288.

The exception in the case of infants, of such tender years as to be incapable of making a choice, is more apparent than real. *People v. Cooper*, 1 Duer., 709.

And will if necessary protect the infant and the party to whose custody it is committed by sending an officer with them. *Rex v. Greenhill*, 4 Ad. and Ellis, 624.

After the infant has arrived at an age when it has sufficient intelligence to determine for itself the court will usually allow it to choose with whom it will go. Hurd on Habeas Corpus, 532-6; *Rex v. Greenhill*, 4 Ad. and Ellis, 624; *Rex v. Johnson*, 1 Strange, 579; Forsyth's Custody of Infants, 106; In re Lloyd 3 Mau and Gr., 547; *Com. v. Taylor* 3 Met. 72; *Com. v. Hammond*, 10 Pick., 274; *People v. Chegary*, 18 Wend., 637; Matter of McDowles, 8 Johns. 328; Matter of Doyle, Clarke's Chy., 154; *State v. Scott*, 10 Foster (Maine) 274; *People v. Pillow*, 1 Sandf. Superior Court, Rep., 276; Matter of Ann Lloyd, 4 Scotts. N. R., 200; But see *State v. Richardson*, 40 N. H. Rep., 272; *Queen v. Clerk* 7 Ellis and Blackburn, 186, as between a parent and a third person.

12. How far a parent may, by agreement, surrender the right to the custody of infant children.

In some cases it was, at one time, held that a parent could not by agreement surrender to another the right to the custody of his infant children and could at his election repudiate such an agreement. *State v. Cloer* 1 Harr (Del.), R., 419; *Mayne v. Bredwin*, 1 Halst. (Chy.), 454; In Re Bircham 16 Eng. Law and Eq. R., 221.

There is however now no question that in America he may do so and that unless a clear breach of the agreement or abuse of the child be shown the courts will not aid him. Hurd on Habeas Corpus, 537. Schouler's Dom. Rel., 343; *State v. Smith* 6 Greenl., 462; *McDowles Case*, 8 Johns., 328; *Fowler v. Hullenbeck* 9 Barb., 810; *Com. v. Gilke*, 1 Phil. Rep., 194; 8 Leg. Intelli.

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gencer, 86; 3 Am. L. J., 505; 5 Penn. L. J., Rep., 30; *Pool v. Gott*, 14 Law Rep., 269, Shaw Ch. J.; *Cons. v. Hamilton* 6 Mass., 273; *State v. Barrett*, 45 N. H., 15. In the latter case, the case of *Regina v. Smith*, 16 Eng. L. and Eq., 221, is said not to have been cited in the later and much considered case of *Queen v. Ellis*, 7 Ellis, and Blackburn 186, and is repudiated.

And such a *parol* agreement may be held valid. *State v. Scott* 30 N. H., 274.

But ordinarily will not, unless the happiness of the child requires that it should. *State v. Libbey* 44 N. H., 321.

Husband and wife being in law one person cannot contract with each other.

An agreement between the father and the mother is contrary to public policy and, as it might tend to separate and break up families, is not legally binding: *Mercen v. People*, 25 Wend., 177; 8 Paige, 47; *Hope v. Hope*, 22 Beav., 351, 357, affirmed 8 De Gex MacNaughten and Gordon 731; *Walrond v. Walrond*, Johnsons (Eng.) Chy. 18; *Earl v. Countess of Westmeath*, Jacob's Chy., 251 note; *State v. Burrett*, 45, N. H. 18; *Cooke v. Cooke*, 1 Barb. Chy. 644.

But if equitable and the circumstances show it ought to be enforced the court will not interfere; *Schouler's Dom. Rel.* 343-4; *Forsyth Custody of Infants*, 39—48, 50; *Scift v. Scift* 34 Beav., 206; *Hamilton v. Hector*, 2 Eng. Rep., 393, L. R. 13 Eq. Cas. 511, and cases cited by court and counsel; *Coleton v. Morris*, Jacob's Chy., 257, note.

And long continued assent may bar a parent's right to the custody of a child; *Lions v. Jenkins*, Jacob's Chy. R. 245.

Although the assent of a father, while living, will not bar the mother on his death, *Wilcox v. Wilcox*, 22 Barb., 178; 14, N. Y., 575.

The following form of a *deed* by a father surrendering the custody and tuition of a minor child is recommended:

Whereas Anna A.—, the wife of Franklin—, and the daughter of John B.—, and Mary B.—, his wife lately died, leaving her surviving a child, a son not yet named; and whereas said Franklin—, the father of such infant, desires to give such child to said John B.—, and Mary, his wife and the survivor of them, and to relinquish to them and the survivor of them all right to the custody and tuition thereof until the said infant child shall attain the age of twenty-one years upon consideration that the said John

B.—, and Mary his wife, shall adopt the said child and care for it as their own: and whereas the affections of both said child and his adopted parents may become engaged and a state of things arise which can not be altered without risking the happiness of such child and his adopted parents should the father attempt to reclaim the custody of such child; Now therefore this indenture witnesseth that the said Franklin, being unmarried, the father of said infant child, does, by this his deed duly executed, pursuant to the form of the statute in such case made and provided, dispose of the custody and tuition of such infant child during its minority to said John B.—, and Mary his wife and the survivor of them in possession. This deed to vest in them and the survivor of them, from the date hereof, all the rights and powers and subject them and the survivor of them to all the duties and obligations of a guardian, and entitle them and the survivor of them to the custody and tuition of such minor until he shall arrive at the age of 21 years. And said Franklin hereby agrees to and with said John B. and Mary, his wife, and the survivor of them that they and the survivor of them may and shall have the custody and tuition of such infant child until he shall arrive at the age of 21 years without let or hindrance from him and that he will not reclaim the custody of said child during his minority, or take any steps or proceedings at law or in equity to recover such custody. And said John B. and Mary, his wife, covenant and agree to and with said Franklin that they will adopt such child as their own and that they and the survivor of them will properly care and provide for said child food, clothing and maintenance in sickness and in health and will properly educate and rear said child as if the same were their own.

In witness whereof the said parties to these presents have herunto set their hands and seals the... day of... A.D., 18..

FRANKLIN A....	[L.S.]
JOHN B....	[L.S.]
MARY B....	[L.S.]

Signed, sealed and delivered in presence of {

.....

The legislature of New York in 1873, chap. 830, provided for the adoption of children by persons desiring to do so.

It may be held in that state that the statute must be complied with but we do not see that the law upon the subject of a parent surrendering the right to the custody of a child is affected by section 13 of the act.

13. The right of a parent to access to children though not entitled to their custody.

A court of equity or one having jurisdiction of the subject will ordinarily order that although a parent be not entitled to the custody of a child that he or she be allowed access thereto. Forsyth's Custody of Infants 85, 139 *et seq.*; Hurd's Habeas Corpus, 479-480. *Matter of Waldron*, 13 Johns., 421; 2 Bish. Mar. and Div., §§ 536-8.

In *Barnes v. Barnes*, L. R. 1 Prob. and Div., 463, 4, it was ordered that the father have access to the children once a fortnight; and in *Suggate v. Suggate* 1 Swab. and Tr., 492, once a week for two hours between 10 A. M. and 4 P. M.

In *Commonwealth v. Smith*, 1 Brewster, 551, the court said: "Mrs Smith must not, however, be denied access to her children. At reasonable times she must be permitted to visit them, and to have them to herself on such occasions, if she desires it. It is right that her offspring should be taught to love their mother, and it depends upon herself whether the legal right to which I have referred shall at a future day be granted to her. If no sufficient cause be shown to the contrary, we can do nothing else than concede it."

In *Phillip v. Phillip*, 27 Law Times, Rep. N. S., 592, Lord Penzance refused the mother access to her child on the ground that it would be injurious to its permanent health, she having been an inmate of a lunatic asylum, being a very excitable, violent woman and having no power to restrain herself and being constantly indulging in stimulants. His lordship however held that he would not refuse the mother access unless satisfied that it would cause real and serious injury to the child adding "I say real and serious injury, because in cases of this kind it frequently happens that affidavits are put in to show that the child is a weakly child, and in poor health, so that it had better not be excited, and that

quiet and rest are the best things for it and so forth; which affidavits the court is very often in the habit of disregarding in favor of the mother or father who wishes to see the child." His lordship required the affidavit of two medical gentlemen to show that access to it by the mother would be likely to cause real and serious injury.

In *Carr v. Carr*, 22 Grattan 168, before cited, the judgment did not provide for access to the child by the mother. The court said (p. 175) "we are of opinion that there was no error in failing to provide that the mother should have access to the child. It does not appear to have been asked and was in fact unnecessary; first because the decree provides that either party may apply at any time for such further order as may be desired; and secondly because the record shows that the heart and home of the husband are ever open to receive his misguided wife."

14. Upon whom the duty of support devolves in cases where the custody is given to the mother.

In such cases the duty of supporting the child rests primarily upon the mother. The court usually, in cases of divorce makes provision for the support of the children awarded to the wife, but if it do not the father is not liable unless upon a promise to pay. The court, however has power upon proceedings founded upon the judgment to compel him to pay to the wife such sum as he is able towards the support of children awarded to the wife. *Burritt v. Burritt*, 29 Barb. 124; *Milford v. Milford*, L. R. 1 Prob. and Div., 715; *Barrere v. Barrere*, 4 Johns. Chy., 197; See Bishop's Marriage and Divorce (5th Ed.) §552-9. *Kamp v. Kamp*, 44 How. Prac., 505; *Cotill v. Corill*, L. R. 2 Prob. and Div. 411, post. p.

The fifth edition of Mr. Bishop's excellent work, on Marriage and Divorce, appears while this note is going through the press. I have been able in a few instances to cite the edition. Mr. Bishop gives very concisely the law relating to the custody of infant children and the reader should consult that work (vol. 2 §§532-551.

C A S E S
DETERMINED BY THE
COURT OF COMMON PLEAS,
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS
IN AND AFTER
MICHAELMAS TERM, XXXVI VICTORIA.

[Law Reports, 8 Common Pleas, 1.]

Nov. 14, 1872

1] *THARSIS SULPHUR AND COPPER COMPANY, LIMITED v. LOFTUS.

*Arbitrator—Average Adjuster—Want of Care in Performance of Duties—
Action for Negligence not maintainable.*

General average losses having been incurred in the prosecution of a voyage, it became necessary to settle and adjust the proportion of the loss which the ship and cargo had respectively to bear, and in order to do so, the plaintiffs, the owners of cargo, and the shipowner agreed to refer the matter to the defendant, an average adjuster, and to be bound by his decision :

Held, that an action would not lie against the defendant at the suit of the plaintiffs for want of care in the performance of his duties as average adjuster, inasmuch as he was in the nature of an arbitrator between the parties.

DECLARATION for that before and at the time of the retainer and employment of the defendant, and of his committing the grievances hereinafter mentioned, the defendant carried on and exercised the business of an average adjuster, and that before the said retainer and employment, and before the committing of the said grievances, a vessel called the Emma, having on board a large cargo of copper ore, of which the plaintiffs were the consignees and owners, and whilst on her voyage from Huelva to Liverpool, met with tempestuous weather, and sustained injuries, and her *said cargo became damaged, and she was thereby compelled to put into a port of distress for repairs, and other necessary purposes, and incurred certain general average and other losses, charges, and disbursements, which

said losses, charges, and disbursements, upon the arrival of the said vessel at Liverpool aforesaid, it became and was necessary to adjust and apportion in manner by usage and custom used and approved, and therefore the master of the said vessel, on her arrival at Liverpool aforesaid, as well for and on behalf of the owners of the vessel as for and on behalf of the plaintiffs, as such consignees and owners of the said cargo, as aforesaid, at the request of the defendant, and for reward to him in that behalf, retained and employed the defendant as such average adjuster, as aforesaid, to investigate and examine the vouchers and accounts of the said losses, charges, and disbursements, and to settle, adjust, make up, and prepare a statement showing the proportion of the said losses, charges, and disbursements to be contributed and borne by the said ship, her freight and cargo respectively, according to the usage and custom of Lloyd's; and the defendant then accepted and entered upon such retainer and employment, and thereupon it became and was the duty of the defendant as such average adjuster, as aforesaid, under the said retainer and employment, to take due and proper care, and to use and employ proper skill and diligence in and about the investigation and examination of the vouchers and accounts of the said losses, charges, and disbursements, and in and about settling, adjusting, making, and preparing a statement showing the proportions of the said losses, charges, and disbursements to be contributed and borne by the said ship, freight, and cargo respectively, according to the said usage and custom. Yet the defendant, not regarding his duty in that behalf, would not take due and proper care, and would not use and employ due and proper skill and diligence in and about the investigation and examination of the said vouchers and accounts, and in and about settling, adjusting, making, and preparing the said statement, and conducted himself so carelessly, negligently, and unskillfully in that behalf; that by and through the carelessness, negligence, and unskillfulness of the defendant in that behalf, the said statement so settled, adjusted, made up, and prepared by him, was incorrect, erroneous, and imperfect in this, that the proportion of the said *losses, charges, and disburse- [3
ments to be contributed and borne by the said cargo of the plaintiffs, was stated, settled, and adjusted at a much larger amount than the same ought to have been stated, adjusted, and settled at, according to the said usage and custom; and in this, that certain special charges were stated, adjusted, and settled as payable by the said cargo of the plaintiffs, which were not so payable according to the said usage and customs, whereby and by reason of the premises, the plaintiffs, confiding in the defendant's performance of his said duty, and not knowing of

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the breach of the same, as aforesaid, and believing that the said statement so settled, adjusted, made up, and prepared, was accurate, and correct, and properly made up, adjusted, and prepared according to the said usage and custom, and that the proportion of the said losses, charges, and disbursements in and by the said statement, stated, adjusted, and fixed as payable by the said cargo of the plaintiffs, was the correct and proper portion payable by the said cargo, and that the said other charges were properly payable by the said plaintiffs' cargo, according to the said usage and custom, paid to the owners of the said vessel, the said incorrect and excessive proportion of the said losses, charges, and disbursements, so stated, adjusted, and settled by the defendant in the said statement, and the said special charges; and by reason of the premises, the plaintiffs have lost and been deprived of the moneys so paid by them, over and above what they otherwise would have paid.

4th plea: That before the making of the said statement by the defendant an agreement in writing was made between Edward James Brown, the master of the said vessel, of the one part, and a certain firm under the style of Messrs. Tennants & Company, as and being the agents of the plaintiffs in that behalf of the other part, which said agreement was in the words and figures following, namely: "This agreement, made the 28th day of April, 1871, between Edward James Brown, master and owner of the English schooner or vessel the Emma, of the first part, and Messrs. Tenants & Company (which includes all members of that firm), of 20 Redcross Street, Liverpool, in the county of Lancaster, merchants, being the owners or consignees of cargo by the said vessel, of the second part. Whereas the said vessel, the Emma, laden with a cargo of copper ore sailed 4] from Huelva, on the 19th day of December, *1870, on a voyage for Liverpool, and on such voyage she encountered a series of heavy storms and seas, and was obliged to put back to Cadiz, and thereby and in consequence thereof considerable damage or loss has been occasioned or sustained to the cargo, and various expenses and disbursements have been incurred, and it will be necessary to have a general average or contribution in respect thereof, to which the said parties hereto of the second part are liable to contribute.

Now these presents witness that in consideration of the engagements and agreements of the said parties hereto of the second part, the said Edward James Brown doth hereby engage and agree with the said parties hereto of the second part, that he the said Edward James Brown will deliver, or cause to be delivered, at a reasonable request and time, the said cargo laden on board the said vessel unto the said parties hereto of

the second part, their factors, agents, and assigns, and permit them to receive, and take possession, and remove the same, according to their rights, possession, and ownership in respect thereof, on their paying freight and other charges, and performing conditions as per bill of lading, charterparty, or agreement, in consideration whereof the said parties hereto of the second part do hereby for themselves jointly engage and agree with the said Edward James Brown to pay to the said Edward James Brown, or his agents, not only the freight and charges of the said goods, but also the proper proportion of the general average loss, general contribution, charges, and expenses in respect of the said cargo, and all legal charges, and other contributions, loss, and expenses to which they are or shall be liable, or for or on assurances of what in the judgment of the parties hereinafter named contribution ought to be made by the said parties hereto of the second part, or what the cargo ought to bear under the aforesaid circumstances, and for the better computing as well the question of contribution as the amount which the said parties hereto of the second part will have to pay in respect thereof; and that the same may be more readily ascertained the said parties hereto of the second part do hereby further agree that the same shall be ascertained by Mr. Henry Loftus, of Liverpool, average adjuster (meaning the defendant), whose decision they the said parties of the second part do hereby agree to abide by and perform, the average to be adjusted in accordance with the usage and *custom of Lloyd's. As witness, &c., Tenants & Co., agents [5 for the Tharsis Sulphur and Copper Co. Witness to the signing, Thomas Barrett, 20 Redcross Street, Liverpool." And the defendant says that his retainer and employment to investigate and examine the said vouchers and to settle, adjust, make up and prepare the said statement in the declaration mentioned was under, by and by virtue of the said agreement, and not otherwise, and the defendant acting in good faith and under such retainer and employment as last aforesaid took upon himself the burden of the said inquiry, and investigated and examined the said vouchers, and made the said erroneous statement Demurrer and joinder in demurrer.

Myburgh, for the plaintiffs. The present case is distinguishable from *Puppa v. Rose* ⁽¹⁾. The defendant here is not a *quasi* arbitrator, as the defendant in that case was. In order that there may be a *quasi* arbitrator, it is necessary that disputes should have arisen between the parties. It does not appear on this plea that any disputes had arisen as to the amount of ave-

(1) Law Rep., 7 C. P., 32, 525.

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rage contribution, but merely that the defendant was employed to calculate the amount.

[BOVILL, C.J. The nature of the agreement set out assumes that the amount was in question between the parties.]

Secondly, it is an average adjuster's business to settle these questions, and he must therefore be taken to hold himself out as prepared to bring to that business a reasonable amount of care and skill. It is not a broker's business to decide as to the quality of goods between parties.

[BOVILL, C.J. This declaration alleges negligence and want of care on the defendant's part. In *Pappa v. Rose* ⁽¹⁾ the facts did not really raise the question of want of care; the only question raised was as to want of skill, though this does not clearly appear from the reports.]

It may well be that want of skill and want of care stand on a different footing. Having selected your arbitrator, you take him for better or worse as far as skill is concerned, but he may still be bound to use reasonable care.

[6] *He also cited Russell on Arbitration, 3d ed. p. 42; *Leeds v. Burrows* ⁽²⁾; *Collins v. Collins* ⁽³⁾; *Bos v. Helsham* ⁽⁴⁾.

Gully, for the defendant. The decision in *Pappa v. Rose* ⁽¹⁾ governs the present case. It is clear that an arbitrator would not be liable for that which is alleged in this declaration; there is no authority or precedent for an action of negligence against an arbitrator; and it is contended that the defendant is in the same position. All the reasons given for the decision in *Pappa v. Rose* ⁽¹⁾ apply equally to the present case. The principle is, that where parties have submitted a question to a third person's decision, and have agreed to be bound by such decision, they take it for better or worse. In cases which amount to misconduct on the part of an arbitrator, there may be a remedy by setting aside the award; but it is contended, that even in such cases no action will lie. The fact that the defendant's business was that of an average adjuster can make no difference in the application of the principle.

[He also cited Russell on Arbitration, p. 461; *Re Hull v. Hinds* ⁽⁵⁾]

BOVILL, C.J. On the question that was chiefly argued before us, viz., whether a person employed, as the defendant was, as an average adjuster, is liable to an action for want of skill, I am clearly of opinion that the case is undistinguishable from that of *Pappa v. Rose* ⁽¹⁾. But that case did not raise the ques-

⁽¹⁾ Law Rep., 7 C. P., 32, 525.

⁽⁴⁾ Law Rep., 2 Ex., 72.

⁽²⁾ 12 East, at p. 6, n.

⁽⁵⁾ 2 M. & G., 847.

⁽³⁾ 26 Beav., 306; 28 L. J. (Ch.), 184.

tion, whether a person so employed is responsible for want of care or negligence. That question might have been raised on the pleadings in *Pappa v. Rose* ⁽¹⁾; but it did not arise on the direction at the trial or on the arguments in this court or the court of error. This is quite clear on reference to the statement of the facts in the case on appeal, though it does not appear from the reports of the case. During the argument of the case in the Exchequer Chamber various observations were made by the judges with reference to the question whether an action would lie against a person in the position of the defendant for misconduct, but no opinion was expressed. No authority has been cited to show that a person called upon to act as an arbitrator, or to settle disputes or adjust *accounts between parties is liable to an action for negligence. In Baron Watson's book on Arbitrators, 3d ed. p. 112, the following passage occurs: "It has been said that an arbitrator is liable to an action if he misconduct himself, but I cannot find any case in which such an action has been brought." The author had a large experience, both as a pleader and at the bar, and he states that he never met with any case in which such an action had been brought; and, so far as my own experience goes, such an action would be quite unprecedented. This argument might not have much weight when the circumstances are novel; but this case must occur constantly. It must constantly happen that parties are dissatisfied with the decision of an arbitrator or *quasi* arbitrator, and yet we find, notwithstanding the facility with which speculative actions for negligence are brought upon the slenderest grounds, that there is no precedent for such an action for negligence as this. It appears to me that the principle upon which *Pappa v. Rose* ⁽¹⁾ was decided applies to this case; and, looking to the inconveniences that would arise if an arbitrator were liable to an action for negligence, I am not disposed to lay it down for the first time that such an action is maintainable. I therefore think our judgment should be for the defendant.

KEATING, J. I am of the same opinion. I think that it would be a very dangerous principle to establish that a person in the position of the defendant may be liable to an action for negligence in the discharge of his functions. It seems to me difficult to discriminate for this purpose between skill and diligence. The court of error has decided that a person in the defendant's position is not bound to bring any particular amount of skill to the performance of his duties. One of the most frequent grounds upon which actions of negligence are brought is not exhibiting due skill in the performance of a duty. Now, with-

⁽¹⁾ Law Rep. 7 C. P., 32, 525.

out deciding what is the proper definition of an arbitrator, it appears to me clear that the defendant is in the position of an arbitrator for the present purpose, inasmuch as he was a person by whose decision two parties having a difference agreed to be bound. It appears to me that the safe rule when parties agree [8] to be bound by the decision of a third *party on any matter is, that they take him in such a case for better or worse; and if he discharges his duty faithfully and honestly they must be satisfied.

For this reason I think the plea is good.

BRETT, J. The effect of the pleadings, taken together, appears to me to be, that there was an agreement by the parties to accept the decision of the defendant on a particular matter, if the defendant would undertake to decide it, and that the defendant did undertake to do so. The declaration alleges a duty on the defendant's part, arising from his so undertaking, to take due care, and to use proper skill and diligence. The question is, whether there is any such duty as alleged imposed upon the defendant in the sense that for non-fulfilment of such duty he would be liable to an action. It is said that there was such a duty imposed upon him, first, as being an arbitrator; secondly, as not being an arbitrator; and, thirdly, because whether in the position of an arbitrator or not, his ordinary business and employment being that of an average adjuster, he must be taken to hold himself out as prepared to bring due skill and care to the performance of his duties in the course of such business and employment.

With respect to the first ground taken, it is admitted that as an arbitrator he would not be liable for want of skill, but it is suggested that he would be for want of care. It appears to me that there are the strongest grounds for deciding otherwise. There must have been thousands of such cases in which an allegation of want of care or diligence might have been made, and yet there is no case in the books in which such an action has been brought. Then it is said that the defendant is liable because he was not an arbitrator, but only a person who had undertaken to adjust accounts between two parties. Now the case of *Pappa v. Rose* ⁽¹⁾ decides that a person who undertakes to give a decision between two parties as to any matter, though he may not be an arbitrator in the strict sense of the word, as not being bound to exercise all the judicial functions for the purpose of deciding the matter in dispute that an arbitrator in the strict sense of the term would have to exercise, nevertheless, is not liable to an action for want of skill. It appears to me that

(¹) Law Rep., 7 C. P., 32, 525.

the reasoning *employed in that case is equally applicable [9 to an action for want of care, and that if an arbitrator in the strict sense of the word is not liable for want of care, it follows that a person who has undertaken to decide a dispute between two parties is also not liable.

Then it was contended that, even though the defendant might be an arbitrator or a *quasi* arbitrator, he is liable, because he holds himself out as a professional average adjuster, and so undertakes to bring due skill and care to the performance of his functions. I apprehend that the principle of law which forbids an action for want of skill or care against an arbitrator or a *quasi* arbitrator, is just as applicable to a skilled or professional arbitrator as to one that is unskilled and non-professional, and that the fact of its being his business makes no difference. For these reasons I am of opinion that the plea is good.

DENMAN, J. The case of *Pappa v. Rose* (1) is not expressly in point, merely because the only question which, upon the facts of the case, absolutely called for decision was, whether an action would lie for want of skill. In this case the principle must be carried a little further, for here the question is whether an action will lie for want of care or negligence on the part of a person in the position of the defendant. I think that although the case of *Pappa v. Rose* (1) does not expressly decide this case, it is, in point of principle, conclusive of it. I adopt the reasoning of Martin, B., in the Exchequer Chamber, and it appears to me that the parties take the person by whose decision they have agreed to be bound for better or worse. Mellor, J., in giving judgment, lays down the same principle: "The contracting parties agree to be bound by the opinion of Mr. Rose, such as it is, he exercising his judgment honestly." So here the parties agreed to be bound by the opinion of the defendant, if he acted honestly, and the plea expressly states that he did so act. For these reasons I think our judgment should be for the defendant.

Judgment for the defendant.

Attorneys for plaintiffs: *Field & Roscoe, for Bateson, Robinson, & Morris.*

Attorney for defendant: *W. W. Wynne, for Simpson & North.*

(1) Law Rep. 7 C. P., 32, 525

[Law Reports, 8 Common Pleas, 10].

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*BEST AND OTHERS v. HILL.

Equitable Set-off — Unliquidated Damages — Cross Claims arising out of the same Contract.

To a declaration for money lent and paid and commission the defendant pleaded for a defence on equitable grounds that it was agreed between the plaintiffs and himself, on the following terms, viz., that he should consign certain rice to the plaintiffs' firm at Buenos Ayres and Monte Video, for sale by the plaintiffs for him upon commission; that the plaintiffs should make certain advances against the rice and pay the expenses of the consignment; and that the plaintiffs should sell the rice, and satisfy out of the proceeds the said advances, expenses, and commission, and pay to the defendant the balance remaining out of such proceeds. The plea further stated that the rice was duly consigned to the plaintiffs, under the agreement; that the claims in the declaration were the advances, expenses, and commission contemplated by the agreement; and that the plaintiffs were guilty of such negligence and improper conduct in the care of the rice and the management of the sale of it, that it fetched much less than it ought to have done, and insufficient to satisfy the advances, expenses and commission, whereas it would, but for their negligence and misconduct, have realized sufficient, and much more than sufficient, to have fully paid and satisfied the same, and the deficiency arising upon the sale, which was the claim for which the action was brought, had therefore entirely arisen from the plaintiffs' negligence, default, and misconduct:

Held, a bad plea.

DECLARATION for money lent, money paid, commission for and in respect of plaintiffs having provided the money for paying and paid divers bills of exchange, for interest and money due on accounts stated.

4th plea, as a defence on equitable grounds, that before and at the time of the agreement hereinafter mentioned, the defendant was, and carried on the business of, a rice merchant at Liverpool, under the name and style and firm of Hill & Smith; and that the plaintiffs were then also commission agents and factors, and as such carried on business at Liverpool, under the name and style and firm of Rodgers, Best, & Co., also at Monte Video, under the name and style and firm of Rodgers & Brothers, and also at Buenos Ayres, under the name and style and firm of John Best & Brothers; and thereupon it was mutually agreed by and between the plaintiffs and the defendant for commission and reward to be received by the plaintiffs on that behalf, that 11] the defendant *should consign rice in certain ships at Liverpool to the plaintiffs' said firms at Buenos Ayres and Monte Video aforesaid, for sale by the plaintiffs for the defendant at Buenos Ayres and Monte Video aforesaid; and that the plaintiffs should accept certain bills of exchange drawn by the defend-

ant on the plaintiffs against the said rice, and in anticipation of the receipt by the plaintiffs of the proceeds of the sales thereof; and that the said bills should be met and paid by the plaintiffs; and that the plaintiffs should make certain advances against the said rice so consigned, and should pay the charges and expenses in consequence of such consignment, acceptances, and sales; and that the defendant should assign and transfer to the plaintiffs the bills of lading in respect of the said rice; and that the plaintiffs should sell the said rice at Buenos Ayres and Monte Video aforesaid, and pay and satisfy out of the proceeds of the said sales such acceptances and several payments by the plaintiffs in respect thereof, also the said advances, charges and expenses and interest thereon, as well as the said reward and commission; and that the plaintiffs should pay to the defendant the balance of the said proceeds, after deducting such acceptances, payments, advances, charges, expenses, reward, and commission as aforesaid.

And the defendant further says that he accordingly consigned rice to plaintiffs for sale upon the terms aforesaid; and the plaintiffs accepted bills of exchange drawn by the defendant against the said rice as agreed: and that the defendant duly assigned and transferred to the plaintiffs the bills of lading in respect of the said rice, and employed the plaintiffs to sell the said rice, and to apply and pay the proceeds thereof upon the terms and in the manner aforesaid and not otherwise. And the defendant further says that the plaintiffs took possession of and held the said rice under and by virtue of the said bills of lading and upon the terms aforesaid, and not otherwise. And the defendant further says that the moneys so mentioned to have been lent and paid as in the declaration mentioned were and are the said advances and payments so made as in this plea mentioned; and that the said bills of exchange in the declaration mentioned were and are the said bills of exchange in this plea mentioned; and that the said interest in the declaration mentioned was and is the interest in respect of the said payments and advances so made by *the plaintiffs as aforesaid; and that the commis- [12 sion in the declaration mentioned was and is the commission in respect of the said sales and consignments and acceptances in this plea mentioned; and that the accounts so mentioned in the declaration to have been stated were stated of and concerning the said advances, payments, commission, reward, and interest as aforesaid and not otherwise. And the defendant further says that the plaintiffs took such negligent, bad, and improper care of a part of the said rice whilst the same was in their possession as aforesaid, that the same when sold by the plaintiffs, as hereinafter mentioned, became and was in bad condition and deterio-

ated in value, and the same by reason thereof was sold by the plaintiffs at much lower and inferior prices than it might and ought to have been sold, and the plaintiffs also negligently and improperly sold the said rice at prices much below the market prices of such several goods when sold, and at which market prices the said rice might, could, and ought to have been sold by the plaintiffs, and the plaintiffs before this suit received the proceeds thereof. And the defendant further says that the said rice before this suit could and might and ought to have been sold and realized by the sales thereof, and but for such bad and improper care and negligent and improper sales and misconduct would have realized sufficient, and much more than sufficient, to have fully paid and satisfied the said loans, payments, reward, commission, charges, interest, acceptances, and the whole of the claims of the plaintiffs in respect thereof and now sued for, if the same had been taken due and proper care of by the plaintiffs, as aforesaid, and sold with due and proper care, and that by and through the mere negligence and willful default and improper conduct of the plaintiffs aforesaid the said rice and the proceeds thereof became, and were before this suit, and are insufficient to discharge the said acceptances, payments, loans, charges, reward, commission, interest, and moneys now sued for, and the said deficiency which is the claim for which this action is brought, and no other or different claim, has entirely arisen from the plaintiffs' said negligence, default, and misconduct.

Demurrer and joinder in demurrer.

Cohen, for the plaintiffs. This is an attempt to set off unliquidated *damages which cannot be done in equity in such a case as this, any more than at law. The case of *Rawson v. Samuel* ⁽¹⁾ is a conclusive authority on the point. It was there held that the mere existence of cross demands, arising out of the same contract, is not sufficient to support an equitable set off. See also *Story's Equitable Jurisprudence*, ss. 1434-1436. In the present case there are all the circumstances which were held to be fatal to the set off in *Rawson v. Samuel* ⁽¹⁾. There are unsettled accounts between the parties, and the one claim arises out of the fulfilment of the contract, and the other out of the breach; a case in which it was expressly laid down by the Lord Chancellor Cottenham that the claims were not connected with one another in such a sense as that an equity to a set off existed. It is quite clear that in such a case a Court of Chancery would not grant a perpetual unconditional injunction. Then it may be contended that the plea, though bad as

⁽¹⁾ 1 Cr. & P., 161.

a plea of equitable set off, is good as amounting to an argumentative general issue, or as showing that the debt arose from the plaintiffs' own default. The court will not interpret an equitable plea like this, when bad as such, as amounting to the general issue unless it very clearly does so. On the most favorable construction of these pleadings for the defendant a debt exists; for if the agreement be construed as meaning that no debt should arise till a sale of the rice, it is clear a debt arises in respect of the deficiency upon a sale, however caused. For a defence against such debt the defendant must go dehors the agreement, and rely on an equity independent of it, which it has been shown does not exist.

Butt, Q.C. (*Baylis* with him), for the defendant. 'It must be taken on demurrer that the allegation in the plea that the damages would exceed the amount of the plaintiffs' claim is true. This makes the case somewhat different from *Rawson v. Samuel* ⁽¹⁾, for there one of the grounds expressly alleged for rejecting the right of set-off was that there was a lengthy and complicated outstanding account, and it could not be known which way the balance would turn out to be. *Beasley v. D'Arcy* ⁽²⁾ is an authority in defendant's favor. In *Stimson v. Hall* ⁽³⁾ Bramwell, B., says: "In *Beasley v. D'Arcy* there was a clear equity; the tenant owed his landlord *rent, and [14 the latter had committed a trespass on the land which rendered it of less value and prevented the tenant, to a certain extent, from getting the rent out of it. The court, in effect, say, you shall not take advantage of the forfeiture, because you have rendered the land of less value by your wrongful act." So here the plaintiffs, by their wrongful conduct of the sale, themselves caused the debt; and here there is the element that was wanting in *Stimson v. Hall* ⁽³⁾, that the cross claims arise out of the same transaction.

[BOVILL, C.J. The lord chancellor said, in *Rawson v. Samuel* ⁽¹⁾, that where the proceedings are one for an account of the transactions under a contract, and the other for damages for breach of the same contract, the fact that the agreement was the origin of both does not form a sufficient bond of union.]

In the case of the *Mutual Loan Fund Association v. Sudlow* ⁽⁴⁾ it was held that a surety might, to an action for the debt, set up as an equitable defence a loss occasioned by the creditor's negligence in realizing a security.

Secondly, the plea is good as amounting to the general issue. The meaning of the agreement is that the plaintiffs shall pay themselves out of the proceeds if they can; and if they can there

(1) 1 Cr. & P., 161.

(2) 2 Sch., & Lef., 403 n

(3) 1 H. & N., 831; 26 L. J. (Ex.), 212.

(4) 5 C. B. (N.S.), 449; 28 L. J. (C.P.), 108.

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is to be no debt. The only debt that could arise under this agreement would be for a deficiency upon the sale, if not occasioned by any default of the plaintiffs. Here the deficiency was caused by their own fault, and so gives rise to no debt.

Cohen, in reply.

BOVILL, C.J. The facts stated in the plea clearly show that no defence can be raised by way of legal set off, inasmuch as the claim of the defendant is in respect of unliquidated damages. With regard to the question whether the plea can be supported as an equitable plea, it appears to me to be equally clear that it cannot, on the ground that the claim is for unliquidated damages, the amount of which has not been ascertained. If this claim were set up as the ground of a bill in equity to restrain proceedings at law, it would not be possible for a court of equity to [5] grant an absolute *unconditional and perpetual injunction; but terms must be imposed. The parties would probably be compelled to proceed to the trial of an action at law to ascertain the amount of the claim, and when such amount was ascertained execution might be stayed. Mr. Butt was pressed with this difficulty, but could give no sufficient answer to it. Another difficulty would be that the proceeding to ascertain the amount of the damages at law would involve considerable delay, and terms would have to be imposed for the purpose of preventing injury to the party delayed, and giving him compensation by way of interest for the delay if successful. There would probably be also some term imposed with reference to payment of money into court. All these considerations show that this claim is not available by way of equitable set off. There is also this further consideration: although these cross claims in one sense are connected, inasmuch as they arise out of the same contract, that does not appear to be sufficient, according to the doctrine of equity in relation to set off; one claim arises out of the performance of the contract, the other out of its breach.

This case seems to me, in principle, undistinguishable from *Rawson v. Samuel*.⁽¹⁾ There the claim on one side was originally for unliquidated damages, but the difficulty did not arise from this fact, for the injunction prayed for was only against execution. The way in which the difficulty as to the non-liquidation of amount arose was that a long account would have been necessary to ascertain which way the balance between the parties was. The bill was amended, and it was alleged that the claim would be larger than the damages; but Lord Cottenham said, "It is admitted that there is a complicated account to be taken between the plaintiffs and the defendant, upon the result

(¹) 1 Cr. & P., 161.

of which, however, the defendant says he believes that a balance will be found due to him . . . The question is whether the defendant in equity, having obtained a verdict as compensation for such breach of contract and consequential injury, ought to be restrained from receiving the sum awarded to him until the complicated account stated in the bill shall have been taken and the balance ascertained. This would produce the most obvious injustice if the balance should be found in favor of the plaintiff at law, which he has sworn he believes it will. And whatever weight may *be attached to this statement of belief as to [16 the probable balance of a long and complicated account, the case is certainly not one in which the plaintiffs in equity can ask the court to assume that the balance will be in their favor.

Then again with respect to the question whether the matters were sufficiently connected, he says: "It was said that the subject of the suit in this court, and of the action at law, arise out of the same contract; but the one is for an account of transactions under the contract, and the other for damages for the breach of it. The object and subject matters are therefore totally distinct; and the fact that the agreement was the origin of both does not form any bond of union for the purpose of supporting an injunction."

It appears to me impossible to distinguish this case from *Rawson v. Samuel* ⁽¹⁾ in principle, and therefore that the plea cannot be supported as an equitable plea; but then it was urged that the plea is equivalent to a plea of never indebted. This can only be the case if, upon the construction of the agreement set out, it appears that no debt ever arose. It appears to me quite clear, upon the declaration and plea taken together, that there was a debt arising, if not before, at any rate upon the deficiency arising out of the sale under the agreement. I am quite at a loss to see how it can be said that under the agreement it was contemplated that the amounts due should be satisfied out of the damages for breach of the contract. For these reasons I am of opinion that the plea is bad.

KEATING, J. I am of the same opinion. It is quite clear that unliquidated damages cannot be set off at law. No authority has been cited to show that a court of equity could deal with this claim as an equitable set off, until the amount had been ascertained. As my lord has pointed out, the case of *Rawson v. Samuel* ⁽¹⁾ clearly shows this to be the case. In the case of *Beasley v. D'Arcy* ⁽²⁾, which was cited on argument, it is evident that the unliquidated demand had become liquidated by the verdict of the jury. I am, therefore, clearly of opinion that, as

⁽¹⁾ 1 Cr. & P., 161.

⁽²⁾ 2 Sch. & Lef., 403, n.

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an equitable plea, this plea cannot be supported. With respect to the question whether it amounts to the general issue, I quite agree with my lord.

[17] *BRETT, J. This plea would clearly be bad as a plea of set off at common law. I am also of opinion that it is bad as a plea of equitable set off; first, on the ground that the cross claims are not connected in the sense in which they must be connected for the purpose of an equitable set off, according to the doctrines of the Court of Chancery; secondly, on the ground that the claim is for unliquidated damages; and, thirdly, on the ground that this is not a case in which equity would grant an unconditional injunction. *Rawson v. Samuel* (1), and *Beasley v. D'Arcy* (2) appear to me to be authorities for so deciding. With regard to the question whether the plea can be supported, as amounting to the general issue, taking the most favorable view of the case for the defendant, it amounts to this: viz. that the defendant agreed, if there was a deficiency upon a sale of the goods, to pay the amount of such deficiency, or to be indebted to such amount. There was a deficiency upon the sale, and consequently a debt arose.

DENMAN, J., concurred.

Attorneys for plaintiff: *Field & Roscoe*.

Attorneys for defendant: *Gregory & Rowcliffes, for Hull, Stone, & Fletcher*.

(1) 1 Cr. & P., 161.

(2) 2 Sch. & Lef., 403, n.

[Law Reports, 8 Common Pleas, 18.]

Nov. 21, 1872.

[18] *STEPHENS V. THE AUSTRALASIAN INSURANCE COMPANY.

Ship and Shipping — Marine Insurance — Deck Cargo — Open Policy — Declaration of Ships — Insurable Interest.

C. & Co., shipowners, were in the habit of receiving shipments of cotton to be carried on deck, sometimes at the shipper's request and at his risk, in which case the bill of lading expressed it to be so shipped, and sometimes for their own convenience, in which case it was at their own risk, and a clean bill of lading was given. To protect themselves against probable loss by jettison in the case of cotton shipped as last mentioned, C. & Co., through the plaintiff, their insurance broker, had effected with the defendants, on the 29th of March, 1864, an open policy to a certain specified amount, to be subsequently declared on. A parcel of cotton consisting of 102 bales was shipped on the 20th of December, 1864, at Alexandria, on board a ship belonging to C. & Co. This cotton was intended to be shipped on deck at shipper's risk, but by mistake C. & Co.'s agent gave a clean bill of lading in respect of it. Being supposed to be at shipper's

risk, it was not declared under the policy, but other shipments of cotton on various vessels, some of them subsequent in date to the shipment of the 20th of December, were declared to the full amount of the policy. The 102 bales were lost by jettison, and the holders of the bill of lading claimed payment of the value of the cotton. The plaintiff thereupon altered the declarations on the policy by declaring the 102 bales, in substitution for a portion of the cotton subsequently shipped. According to the usage of the insurance business, as found in a special case stated between the plaintiff and defendants in an action to recover the value of the 102 bales on the policy of the 29th of March, in the case of policies on ships to be declared the policy attaches to the goods as soon as and in the order in which they are shipped, in which order the assured is bound to declare them. In case of mistake as to the order of shipment he is bound to rectify the declarations, which is sometimes done even after loss:

Held, that C. & Co. had an insurable interest in the 102 bales of cotton, inasmuch as by the terms of the bill of lading, signed by their agent, and by which they were bound, the cotton was at their risk; that the usage, as stated in the case, was binding, since it was not unreasonable, and by virtue of it the declaration on the policy could be rectified even after the loss was known; that even apart from the usage as stated, the doctrine to be deduced from the authorities is that, according to the usage of merchants and underwriters recognized by the courts without parol proof in each case, a declaration may be altered even after the loss is known, if such alteration be made without fraud, of which there was no evidence in the present case; and that the plaintiff was, on these grounds, entitled to recover the value of the 102 bales on the policy of the 29th of March.

SPECIAL CASE. The facts of the case and the arguments sufficiently appear from the judgments.

Nov. 20, 1871. *Holker*, Q.C., (*Watkin Williams* with him), for the plaintiff.

**Honyman*, Q.C. (*G. Bruce* with him), for the defendants. [19

In addition to the cases referred to in the judgments, the following cases were cited: *Harman v. Kingston* (1), *Kewley v. Ryan* (2), *Henchman v. Offley* (3), and *Robinson v. Touray* (4).

Cur. adv. vult.

Nov. 21, 1872. The judgment of the court (*Keating and Brett*, JJ.) was delivered by.

BRETT, J. (5). In this special case the facts stated which seem to be material are, that the plaintiff acted in London as insurance broker for Messrs. Chapple & Co., shipowners; that they were owners of a line of steamers plying between Alexandria and Liverpool; that their agent at Alexandria was Mr. Grace; that during the American war Chapple & Co., were extensively engaged in carrying cotton from the Levant to Liverpool; that part of the cotton was frequently carried on deck; that some cotton was so carried by the request and then at the risk of the skipper, and for a less freight; that in such case it was the practice that it should be stated in the bill of lading that the

(1) 3 Camp., 150.

(2) 2 H. Bl., 343.

(3) 2 H. Bl., 345, n.

(4) 3 Camp. 158; 1 M. & S. 217.

4 ENG. REP.] 38

(5) Willis, J., had agreed to the judgment, but his death took place before it was delivered.

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cotton was on deck by the shipper's request and at his risk ; that some cotton was carried on deck by the shipowner in order to enable him to carry a larger cargo ; that in such case it was at the shipowner's risk ; that in such case he gave a clean bill of lading ; that shipowners who carried deck loads for their own convenience, and therefore at their own risk, often protected themselves against probable loss by jettison, by keeping on foot open policies, especially effected to cover the risk, and by declaring upon them. The case then contained the following statement as to usage: "According to the usage of the insurance business, when a policy is effected on goods by ship or ships to be thereafter declared, the policy attaches to the goods as soon as and in the order in which they are shipped ; and directly the assured knows of the shipment of the goods he is bound to declare them to the underwriter on the policy, and to declare them in the order in which they are shipped. He is not entitled [20] to *declare some of the risks, and remain his own insurer as to the others. In case by oversight or otherwise the goods are declared on the policy in an order different from that in which they were shipped, the assured is bound to rectify the declarations and make them correspond with the order of shipment. The underwriter would require to see the bills of lading, and could insist on the declarations being made to follow the sequence of the bills of lading. The declarations are often thus rectified, and sometimes even after loss."

In 1864 and 1865 Messrs. Chapple & Co., through the plaintiff, their broker, effected in London with the defendants and others certain policies on cotton on deck per steamer or steamers from Asia Minor to Liverpool. The first set of such policies was made on the 29th of March, 1864, to the amount of 25,000*l.*, and the second set was made for a further sum of 25,000*l.*, to follow on the 12th of January, 1865. In the autumn of 1864, and at the beginning of 1865, Messrs. Chapple & Co., by Grace, their agent at Alexandria, shipped thence in various steamers cotton on deck at their risk and cotton below. Declarations were made on the cotton shipped on deck on the policies before mentioned in the order of shipments in respect of all the cotton shipped on deck except in respect of one parcel shipped on board the *Behera*. Such declarations were made in London by the plaintiff upon information of the shipments forwarded by Grace to Chapple & Co. The declarations on the policies of the 29th of March, 1864, were made as follows :

29th Oct. 1864, 3400*l.* on 68 bales per *Lybia*.

29th Nov. " 7000*l.* " 102 " *Ajax*.

10th Dec. " 2500*l.* " 44 " *Ocean King*.

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31st Dec.	"	1200l.	"	20	"	Behera.
9th Jan. 1865,		7000l.	"	115	"	Nyanza.
16th Jan.	"	3900l.	"	81	"	Nyanza.

25,000l.

Declarations were also made, but not to the full amount on the policy of the 12th of January, 1865. It afterwards appeared that under the circumstances stated in the case, Messrs. Choremi, Mellor, & Co. had shipped 102 bales of cotton on board the Behera at Alexandria on the 20th of December, 1864, that is to say, before the shipment on board the Behera of [21] twenty bales on the 31st of December, and before the shipments on board the Nyanza of the 9th of January and the 16th of January, 1865. The 102 bales were directed to be received, and were, in fact, received to be shipped on deck at shippers' risk, but, by mistake, a clean receipt was given for them by the mate, and a clean bill of lading by Grace. He, however, supposing always that the 102 bales had gone at shippers' risk, did not advise the plaintiff to declare them, and they were not declared. The Behera sailed from Alexandria and encountered heavy weather, and on the 15th of January, 1865, the 20 bales and 102 bales were jettisoned. The loss became known to Chapple & Co. on the 18th of January, 1865. The vessel arrived in Liverpool on the 19th of January. On the 25th of January, 1865, Messrs. Mellor & Co. of Liverpool claimed payment of the value of 102 bales as being owners of a clean bill of lading given in respect of them. The plaintiff, on the 27th of January, 1865, altered the declarations on the policies of the 29th of March, 1864, as follows: he struck out the "7000l. on 115 bales per Nyanza" and "3900l. on 81 bales per Nyanza," and replaced those declarations as follows:

"9th Jan. 1865, 6000l. on 102 bales per Behera,
 " " 4900l. " part of 115 " Nyanza."

He at the same time altered the declarations to correspond on the policies of the 12th of January, 1865. A portion of the policies of the 12th of January, 1865, sufficient to cover the loss on the Behera deck cargo remained still undeclared, and the plaintiff on the 27th of January, 1865, filled up the said policies by declaring, amongst other declarations, "6000l. on 102 bales per Behera."

On these facts it was argued before us, on behalf of the plaintiff, that Chapple & Co., had an insurable interest; that although the intention of the shippers at the time of shipment was, in fact, that the goods should be carried on deck at their risk, and

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although, at the same time, it was the intention of Messrs. Chapple's agent, Mr. Grace, to receive them to be carried on deck at shippers' risk, yet inasmuch as Grace had, by mistake or negligence, given a clean bill of lading, Messrs. Chapple & Co., could not protect themselves against the holders thereof in respect of the loss by jettison, even though such holders 22] might be identical with *the shippers; that Chapple & Co., therefore, stood to lose by a jettison by reason of perils of the sea, and were therefore so far interested as to be entitled to insure against such loss. It was further contended on behalf of the plaintiff, that Chapple & Co., were insured against the loss which had occurred on and by virtue of the policies of the 29th of March, 1864; that, by the usage of insurance business, they were not only entitled, but bound, to rectify the declarations on that policy as they had done, and that the declarations were to be read as if the shipment of the 102 bales on the 20th of December, 1864, had been declared in due order; and that the declarations might be properly ordered after the loss was known.

It was contended on behalf of the defendants that the ship-owners, Messrs Chapple & Co., were not bound by the mistake or negligence of Grace in signing a clean bill of lading; that under the circumstances he had no authority to sign any but a bill of lading expressing that the goods were shipped by the request of the shippers, and at their risk; that Messrs. Chapple & Co., not being bound by the clean bill of lading, were at no risk, and therefore had no insurable interest; that if they had such interest it was not insured, for that by the recognized law of insurance the assured were not bound to declare the goods which they shipped in the order of shipment; that they were not bound to declare all shipments; that they could not, after they had once declared, alter such declarations; that even if they could at some time alter such declarations, they could not do so after the loss and their knowledge of it; that they were bound to declare within a reasonable time after shipment; that, if they did not, a subsequent declaration was void; that no declaration could be properly made after loss and knowledge of it; that consequently in this case the loss which had occurred was not insured by either policy.

The first point raised by these arguments is, whether Messrs. Chapple & Co., had an insurable interest. We are of opinion that they had. It may be true that Grace was not in one sense authorized to sign a clean bill of lading under the circumstances, but it is in the sense that his duty to his principals required him not negligently to sign in that form; he had the authority so frequently given to agents in his position, that is, to sign bills

of lading as and *for the master of the ship, and therefore [23 his signature was equivalent to that of his principals, Messrs. Chapple & Co., and made the bill of lading their contract, and a contract in writing applicable to the goods shipped under it; the effect of which, according to a legal construction of the written contract contained in it to be declared by the court, could not at law be varied by evidence that it was signed in its existing form by negligence or mistake. The bill of lading, according to its legal construction, made Messrs. Chapple & Co. liable for a loss of the goods by jettison, the result of their being carried on deck; it follows that Chapple & Co. had an insurable interest.

The next question raised, is whether Chapple & Co., were insured in respect of the risk on the 102 bales of cotton on board the Behera. Now the usage stated in the case is a large usage, more comprehensive, we believe, than it has been proved or assumed to be in any of the cases which are in the books relative to this matter; but if it is not unreasonable, it is binding on the court in this case. We are not prepared to say it is unreasonable; it follows that it is binding. Then it seems clear that Chapple & Co., were insured by the policies of the 29th of March: for the 102 bales on board the Behera were shipped on board on the 20th of December, 1864, when the policies were not exhausted by prior shipments to which they were applicable, and Messrs. Chapple & Co., were bound to rectify the declarations, and make them correspond with the order of shipment. It seems to us that the usage, as now stated, makes the case of *Gledstanes v. Royal Exchange Assurance* ⁽¹⁾, and *Ionides v. Pacific Insurance Co.* ⁽²⁾ inapplicable. But if that be not so, we still think the plaintiffs, on the statements made in this case, are entitled to recover. The doctrine to be deduced from those cases is that, according to the usage of merchants and underwriters, as recognized by the courts without formal proof in each case, a declaration of this kind, which it is the right of the assured to make without the consent of the underwriter, may be altered even after the loss is known, if it be altered at a time when it can be, and is altered innocently and without fraud. If that be a true proposition, and we think it is, and if it be applicable in this case, we think that *the al- [24 terations made on the 27th of January, 1865, in the declarations on the policies of the 29th of March, 1864, were legally made. At that time the loss of the goods by jettison was known to the assured; but the state of things at the time of shipment was not known to them. They seem to have made the alteration in the *bonâ fide* belief that their agent had neglected to in

(1) 5 B. & S., 797; 34 L. J. (Q.B.), 30.

(2) Law Rep., 6 Q.B., 674.

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form them of the shipment by the Behera, and with a *bonâ fide* intention of rectifying the mistake according to the custom. There is no finding in this special case that they acted otherwise than innocently and without fraud. The judgment must therefore be for the plaintiff, as upon a loss upon the policies of the 29th of March, 1864, in respect of the loss by jettison of goods loaded on board the Behera. *Judgment accordingly.*

Attorneys for plaintiffs: *Westall & Roberts.*

Attorneys for defendants: *Wallons, Bubb, & Wallon.*

[Law Reports, 8 Common Pleas, 29.]

29] *TICHBORNE, Bart. v. SIR PYERS MOSTYN, Bart., and Another.

May 2, *1872.

Ejectment — Stay of Proceedings until Payment of Costs of a former Ejectment — Notice to proceed under s. 202 of the Common Law Procedure Act, 1852 — Surprise.

To entitle a defendant in ejectment to apply for a stay of the proceedings until the costs of a former unsuccessful action of ejectment are paid, it is not necessary that the parties should be precisely the same, or the premises sought to be recovered identical; it is enough that the plaintiff is the same in both actions and that the same title in substance is in issue.

To induce the court to abstain from acting upon this rule, it must be clearly made out that the plaintiff's want of success on the former occasion was the result of perjury or fraud, or some miscarriage for which he was not responsible.

Before moving for a stay of the proceedings, the defendants had given the plaintiff the twenty day's notice to proceed, under s. 202 of the Common Law Procedure Act, 1852:

Held, that this was no waiver of their right to move for a stay of the proceedings until the former costs should be paid.

But, the probable amount of the costs being large, the court made it a condition that the time for proceeding to trial should be extended by six months.

EJECTMENT for the recovery of a messuage and premises in Gray's Inn Road, forming part of an estate called the Doughty estate. The writ was dated the 29th of June, 1868. The now defendants were allowed to appear and defend as landlords, the appearance of the original defendants (tenants and undertenants of the premises) having been struck out by an order dated the 14th of November, 1868.

The now defendants are the trustees (substituted by an order of the Court of Chancery made on the 5th of December, 1857, and an indenture dated the 3d of October, 1862), under the will of the late Roger Charles Tichborne, deceased, which was

* Decided in Easter Term, 1872.

¹ For proceedings against certain members of Parliament for public speeches on behalf of the claimant, see *Reg. v. Onslow*, et. al., 12 Cox Cr. Cas., 358, to be published in the present or next volume.

proved in the Prerogative Court of Canterbury on the 17th of July, 1855, by the executors therein named, evidence having been first given of the supposed death at sea of Roger Charles Tichborne on or about the 26th of April, 1854.

At the time of the supposed death of Roger Charles Tichborne, he was entitled, under settlements dated respectively the 4th of May, 1844, and the 10th of May, 1850, on the death of his father, Sir James Francis Doughty Tichborne, Bart., now deceased, to *interests in certain estates called the Tichborne [30 and Doughty estates, to hold as follows: as regards the former as tenant for life, with remainder to his sons in tail male, and, in default of issue, to the second and other sons of Sir James F. D. Tichborne for life, with remainder to their sons in tail male; and, as regards the latter, as owner in fee.

Under the will of Roger Charles Tichborne, the Doughty estate, of which he was entitled to the ownership in fee, devolved upon the defendants, to hold in trust, after the payment of certain charges, for the benefit of Sir Henry Alfred Joseph Doughty Tichborne (the only son of the late Sir Alfred Joseph Doughty Tichborne, the younger brother of Roger Charles Tichborne), a minor. Under the trusts of the before mentioned settlements of the Tichborne estate, the infant, Sir Henry Alfred Joseph Doughty Tichborne also became entitled, as heir male of Sir Alfred Joseph Doughty Tichborne, deceased, to the Tichborne estate.

The plaintiff in this action claims to be the Roger Charles Tichborne who was supposed to have been lost at sea; and, at or about the same time as the writ in this case was issued, the plaintiff commenced another action of ejectment in this court, entitled *Tichborne v. Lushington*, for the recovery of the Tichborne estate, the defendant Lushington being one of the tenants on that estate; in which action the sole issue to be tried was, the identity of the plaintiff with Roger Charles Tichborne.

In the action of *Tichborne v. Lushington*, Dame Teresa Mary Josephine Doughty Tichborne and the Hon. William Stourton, as guardians of Sir Henry Alfred Joseph Doughty Tichborne, were by order let in to defend. That action was tried in this court before Bovill, C.J., and a special jury. The case on the part of the claimant being closed, and counsel for the defendants having addressed the jury at considerable length, and several witnesses having been called to contradict the plaintiffs' evidence, the foreman of the jury upon Monday, the 102d day of the trial, addressing himself to the chief justice, read from a written paper the following: "We have now heard the evidence regarding the tattoo marks; and, subject to your lordship's direction, and to the hearing of any evidence that the counsel

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desire to place before us, I am desired to state the jury do not 31] require further evidence." *Mr. Sergeant Ballantine thereupon applied for an adjournment, in order to enable him to consider this statement and to consult with Mr. Giffard (then on circuit) and the other counsel engaged with him for the plaintiff. It was accordingly arranged that the trial should be adjourned until the following Wednesday, the foreman of the jury observing, "It is quite clearly understood, of course, that it is subject to the hearing of any evidence which your lordship or the counsel may desire." At the sitting of the court on the Wednesday, Mr. Sergeant Ballantine, with the assent of his client, and having had a communication from Mr. Giffard, elected to be nonsuited.

The costs of the action of *Tichborne v. Lushington*, which it was sworn would exceed 40,000*l.*, were unpaid, and, by reason of the bankruptcy of the claimant ⁽¹⁾, were not likely to be paid.

In the present action — which was brought for the recovery of the Doughty estate, the issue in which was the same as in the former action, viz., the identity of the claimant with Roger Charles Tichborne, and in which the same title was involved, and the parties substantially though not nominally the same — notice of trial was given on the 25th of July, 1868, for the first sitting in the then next Michaelmas Term: but, the proceedings having been stayed partly by order and partly by the tacit understanding of the parties, nothing further was done therein until the 11th of March, 1872, when the following notice, pursuant to s. 202 ⁽²⁾ of the Common Law Procedure Act, 1852, was served upon the plaintiff's attorneys: "We ⁽³⁾ hereby give you notice and require you in twenty days from the date hereof to proceed to trial in this action at the sittings next after the 32] expiration of such twenty *days, and that, if you neglect to give notice of trial for such sittings, judgment will be signed against you according to the form in that case provided."

By an order of the 23d of March, 1872, the plaintiff's attorneys were changed, and leave to amend the issue was obtained, and the amended issue was delivered on the 27th, with notice

⁽¹⁾ He was adjudicated a bankrupt on the 29th of June, 1870, and still remained uncertificated.

⁽²⁾ "If after appearance entered the claimant, without going to trial, allow the time allowed for going to trial by the practice of the court in ordinary cases after issue joined to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and,

if the claimant afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial, in pursuance of the said notice given by the defendant, and the time for going to trial shall not be extended by the court or a judge, the defendant may sign judgment in the form contained in the schedule (A) to this act annexed, marked No. 19 and recover the costs of defence.

⁽⁴⁾ The defendants' attorneys.

of trial for the first sitting in Easter Term. A correspondence then ensued between the respective attorneys, the plaintiff's attorneys proposing and the defendants' attorneys objecting to a postponement of the trial of this cause until after the plaintiff should have been tried upon an indictment for perjury preferred against him under an order made by the chief justice at the trial, under 14 & 15 Vict. c. 100, s. 19; and on the 13th of April, 1872, the defendants' attorneys gave notice of their intention to make the cause a special jury cause.

Hawkins, Q.C. (*H. Matthews*, Q.C., and *H. F. Purcell*, with him), moved for a rule calling upon the plaintiff to show cause why the proceedings in this action should not be stayed until the costs of the action of *Tichborne v. Lushington* were paid. He also intimated that he should move for security for costs; but this part of the motion was ultimately abandoned. He submitted that, to entitle the defendants to make this application, it was not necessary that the parties to the two actions should be *precisely* the same, but that it was enough if they were *substantially* the same, provided the title and the issue to be tried were the same in both actions; that there was nothing inconsistent in asking for such a rule and still holding to the notice under s. 202 of the Common Law Procedure Act, or that, if the two proceedings were inconsistent, the only consequence would be that the notice was waived, or the court might if they thought fit extend the time for proceeding to trial under it.

Giffard, Q.C., showed cause in the first instance. The parties to this and the former action are not the same, nor is the property sought to be recovered the same. The persons on whose behalf this motion is made are not the persons entitled to the costs of the former action, which are a charge upon the Tichborne estate, and not upon the estate which is the subject of this action. Besides, *the courts never interfere in this [33 way, or by the analogous course of ordering security for costs, where it appears that the former verdict had been obtained by fraud and perjury, — *Doe d. Rees v. Thomas* ⁽¹⁾ or the plaintiff has not had an opportunity of having a fair trial; nor after the defendant has taken a step in the cause: *Muller v. Gernon* ⁽²⁾. The rule upon which this application is based is not an inflexible one: it is only granted where the plaintiff is proceeding vexatiously, or where injustice would otherwise be done. The notice to proceed, given by the defendants under the 202d, section of the Common Law Procedure Act, 1852, is clearly inconsistent with the present application, and operates as a waiver of the defendants' right to make it. The circumstances

(1) 2 B. & C., 622.

(2) 3 Taunt., 272.

under which the former trial was brought to a premature close would have justified an application for a new trial on the ground of surprise. The plaintiff was taken by surprise by the evidence given for the defendant.

Hawkins, Q.C., H. Matthews, Q.C., and Purcell, in support of the motion, relied on *Doe d. Chadwick v. Law* ⁽¹⁾; *Harvey d. Beal v. Baker* ⁽²⁾; *Prowse v. Loxdole*. ⁽³⁾ They further submitted that a rule for a new trial on the ground of surprise is never granted except on payment of costs.

[BOVILL, C.J., referred to *Doe d. Brayne v. Bather*. ⁽⁴⁾]

BOVILL, C.J. The application now made to the court is, that the proceedings in the present action of ejectment be stayed until the costs of the former action of *Tichborne v. Lushington*, in which the present plaintiff was nonsuited, shall have been paid. Mr. Hawkins intimated, in the first instance, that he meant also to ask for security for costs; but he has not pressed that part of the motion. The case, therefore, stands before us upon the simple question whether this court will, under the circumstances, order that the proceedings in this action be stayed until the plaintiff has paid the costs of the former action.

It is perfectly plain, from the affidavits and the statements of counsel on both sides, that the question at issue in both actions [34] is *precisely the same. I do not mean to say that there may not be some difference in the formal proofs of title in the two cases; but in both the plaintiff is the same, and the substantial question to be tried is the same, viz. whether or not the plaintiff is Sir Roger Charles Tichborne, Bart. It is true that the defendants in the two actions are not the same; and in truth there is scarcely an instance of two actions of ejectment brought upon the same title where the parties are precisely the same. The action is usually brought by the person claiming to be entitled to the estate against a tenant in possession of some part of it. Here, the first action was brought against Colonel Lushington as the occupying tenant of Tichborne House; the second action, which was brought in respect of what is called the Doughty estate, was brought against the occupying tenants of premises forming part of that estate, the trustees of the settlements relating to that estate being let in to defend as landlords. The parties who appeared and defended in the first action were, as here, the trustees and guardians of the infant son of Sir Alfred Tichborne, Bart. Substantially, therefore, the defendant in each case is the infant, the parties appearing on the record to defend being in one sense mere nominal par-

⁽¹⁾ 2 W. Bl., 1158.

⁽²⁾ 2 Dowl. (N.S.), 75.

⁽³⁾ 3 B. & S., 896; 32 L. J. (Q.B.), 227.

⁽⁴⁾ 12 Q.B., 941.

ties, having only the dry legal interest vested in them. There are somewhat different limitations in the settlements with regard to the two estates. The trustees of the Doughty estate are not the trustee of the Tichborne estate; and hence it is that the parties, so far as the defendants are concerned, are not the same in both actions: but the question at issue is precisely the same in both.

The plaintiff, having failed in the first action, and having elected to be nonsuited, now seeks to try precisely the same question with the trustees of the infant heir, in an action to recover possession of the Doughty estate; and this without recouping the defendant, who, as I before observed, is substantially the same in both cases, the expenses incurred in defending the right on the former occasion.

Now, where a matter of this kind has been fully investigated in a court of law, and the plaintiff has failed to establish his claim, it, has long been the practice of the courts to interpose, in order to prevent the defendant being put to great, and it may be ruinous, expense in defending his possession in a second action, until the *costs of the first proceeding have been [35 paid. That has been the practice from a very early period; and I am at a loss to discover any ground upon which we can be called upon to abstain from applying that rule in the present case. The result of this motion is doubtless of great importance to the parties. It has been argued before us at considerable length, and with great force and ability: and I think it right to go through the principal authorities which bear upon the subject.

The rule with regard to actions of ejectment is to be found in all the books of Practice. In the 9th edition of Tidd's Practice, published so long ago as the year 1828, there is the following passage at p. 1232: "In a second ejectment, the courts will stay the proceedings until the costs are paid of a prior one for the trial of the same title, and also the costs of an action, if any has been brought, for the mesne profits; and it matters not whether the second ejectment be brought by the lessor of the plaintiff or by the defendant in the former one, or by or against all or some of the parties, or by a third person under whom the lessor of the plaintiff claims, or for the same or different premises, so as it be on the same title and for part of the same estate; nor whether it be brought in the same or a different court. The length of time which has elapsed between the first and second ejectment is not material; for, there may be many good reasons why the defendant did not call for the costs sooner, such as, poverty of the other party, or in order to quiet any further controversy. The vexation of the party is

said to be the foundation of these rules ; and therefore, when there appeared to be no vexation, the courts would not formerly have made a rule for staying proceedings until the costs were paid of a prior ejectment. But the practice in that respect is altered, and it is now settled that the proceedings may be stayed in all cases until the costs are paid of a former ejectment ; and the courts will stay them if the conduct of the party against whom the application is made has been vexatious or oppressive, although he is not liable to the costs of the first action ; but they will not stay the proceedings in the second action where the party is already in custody under an attachment for non-payment of the costs of the first action, nor, as it seems, if it appear that the verdict in the former action was obtained by 36] fraud and perjury. *So, the Court of Common Pleas would not stay the proceedings in a writ of right till the costs of a prior ejectment were paid ; and the Court of King's Bench refused to stay the proceedings in ejectment until the taxed costs were paid of a suit in equity brought by the same party for the recovery of the same premises : so, in a second ejectment by a pauper, the court, we have seen, refuse to grant a rule for staying the proceedings until the costs were paid of a prior ejectment for the same cause ; but it was admitted that he would not in such second action be allowed to sue in *forma pauperis*. And, where a rule had been obtained for staying the proceedings in ejectment till the costs of a former ejectment were paid, the court would not interfere and permit the defendant, in case those costs were not paid before a certain day to be named by the court, to *non-pros.* the second ejectment. If there be judgment for the plaintiff in ejectment, and the defendant bring a writ of error, the Court of King's Bench will not suffer the latter to proceed in a new ejectment on the same title till he has quitted possession, or the tenants have attorned to the lessor of the plaintiff. So, if there be judgment for the defendant in ejectment, and the lessor bring a writ of error, the court will not suffer him to proceed in a new ejectment on the same title, until the costs are paid of the former ejectment." Nothing can be more clear than the rule there laid down ; and this case falls within it.

But I think it right to call attention to one or two other cases which have been decided upon this subject. The first which I will mention is *Keene d. Angel v. Angel* ⁽¹⁾. There, a rule *nisi* had been obtained for staying the proceedings until the costs of a former ejectment brought by the same lessor of the plaintiff were paid. Three objections were taken : " First, that the defendant had been guilty of laches in not having before applied

(1) 6 T. R., 740.

for the costs of the former nonsuit, which was in 1793 (the motion for a stay of proceedings not being made till 1796), the costs of which had not been taxed till Hilary Term last. Secondly, there is another defendant now, who was not a party to the last ejectment. Thirdly, the present ejectment is for different lands, in a different county." Lord Kenyon, delivering the judgment of the court, said: "The only question in this case is, whether the second ejectment is in *substance [37 brought to try the same title: if so, the rule is of course to stay the proceedings until the costs of the former ejectment have been paid.

As to the laches, as it is called, of the defendant in not calling for the costs of the former nonsuit before, that is rather in favor of the lessor of the plaintiff than a ground of objection on his part; and there may be many good reasons for such a proceeding on the part of the defendant, such as, the poverty of the other party, or a view to quiet any further controversy. In *Doe d. Duchess of Hamilton v. Hatherley* ⁽¹⁾, there was a much longer period intervening between the two ejectments, viz. from the 6th George the 1st to the 14th George the 2d; but that was held no objection to such a rule as the present." There is another and a more recent case, and one which has a very important bearing on the present application. I called Mr. Giffard's attention to it in the course of his argument; but, though he admitted that he was aware of it, he did not attempt either to contest the propriety of the decision or to distinguish it from the present case; and this probably for the best of all reasons, viz. that it is entirely in accordance with the rule which has so long prevailed in the courts, and that it has so close a bearing upon the facts and circumstances of this case that it would be utterly impossible to point out any substantial distinction. The case I allude to is *Doe d. Brayne v. Edward Butcher* ⁽²⁾. Lord Denman, in giving judgment, said ⁽³⁾: "We cannot but see that the present action relates to part of the estates devised by the will which was in question before, and that the same party as lessor of the plaintiff is trying to establish in this action what he then failed to establish." Coleridge, J., said ⁽³⁾: "John Brayne was a defendant in the former ejectment brought by a devisee of William Brayne, of which the costs have not been paid. Now he, with his wife as a joint lessor of the plaintiff, brings an ejectment against another devisee of William Brayne, drawing into question the validity of the same will.

It is contended that the present defendant was not put to vexation by the former suit, and that the present action is new as to the lessors of the plaintiff. But, if the wife has a claim,

⁽¹⁾ 2 Str., 1152.

⁽²⁾ 12 Q. B., 941.

⁽³⁾ 12 Q. B., at p. 948.

it must be as a devisee under the will. We are not to assume 38] that *she has a separate property in the land to be recovered. Her husband, therefore, claims a present interest in the land, which interest he seeks to enforce by again litigating the title already tried. This being so, we ought not to refuse the rule simply because the defendant is not the same as before. It is sufficient here that the party on the one side is the same, the property (for this purpose) the same, and the same question raised by the suit." And Erle, J., with reference to this last point, said (1): "It is said that the defendant here is a stranger to the former suit. Co-devisees would, I think, clearly have a joint interest in sustaining the will: but I do not consider it necessary to put the decision upon that point. It is enough that John Brayne, the lessor of the plaintiff, was party to the former ejectment as well as this, and the question raised is the same in both."

Adopting the language in all these cases, and the rule stated by Mr. Tidd, it is sufficient here that there is the same plaintiff, who is seeking to try the same question in both actions, and that he failed in the first by his counsel having elected to be nonsuited after a distinct intimation from the jury that they were prepared to find against him. That being the state of things, according to all the authorities he is not to be permitted to proceed to the trial of the second action until he has paid the costs of the former inquiry. When the Common Law Procedure Act, 1852 was passed, which to some extent substituted a new form of proceeding for the recovery of land in place of the old action of ejectment, it was thought right to enact (2) that the courts and judges might exercise over the proceedings the like jurisdiction as theretofore exercised in the action of ejectment. The old practice, therefore, where not inconsistent with the changes introduced by that act, still remains; and in accordance with that practice and with every precedent with which I am acquainted, I think the defendants are entitled to have this rule made absolute.

Several objections have been urged as to the power of the court to grant this rule, and as to this being a fit case for the exercise of its discretion, if the power exists.

First, Mr. Giffard has contended that the defendants have waived their right to make this application, by giving the plaintiff 39] *a notice to proceed, under s. 202 of the Common Law Procedure Act, 1852. The action being at issue, and having stood over for some years, the defendants naturally desire that it shall be brought to its proper termination in due course of law. The ordinary practice formerly was to force the plaintiff

(1) 12 Q. B., at p. 949.

(2) By 15 & 16 Vict., c. 76, s. 221.

on by a series of rules and demands, and to sign judgment of *non-pros.* against him if he failed to proceed. Now, the Common Law Procedure Act, 1852, has provided, with regard to this action of ejectment, in s. 202, that "if, after appearance entered, the claimant, without going to trial, allow the time for going to trial by the practice of the court in ordinary cases after issue joined to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and, if the claimant afterward neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial shall not be extended by the court or a judge, the defendant may sign judgment" in a form given in a schedule to the act. The plaintiff having failed in the first action, the only course the defendants in this action could adopt, in order to put a stop to further ruinous litigation, was, to give a notice under that section; and this was done in the hope, no doubt, that the claimant would submit to have judgment entered against him. The giving of the notice is a part of the proceedings in the cause for the purpose of bringing it to a termination. The notice having been given, the plaintiff complied with it as far as was in his power. The cause was set down for trial; and, being made a special jury cause, it would in the ordinary course have come on for trial at the sittings after next Trinity Term. I am at a loss to see how the giving of the notice under s. 202 can amount to a waiver by the defendants of their right according to the invariable practice of the court to insist upon the costs of the former action being paid before the claimant is allowed to proceed to the trial of the second action.

The cases cited by Mr. Matthews seem to me to be quite conclusive. In *Doe d. Chadwick v. Law* ⁽¹⁾, the case was not only standing for trial, but the witnesses had been brought to town for the purposes of the trial; and yet, notwithstanding the [40] application was made so late, and the costs had not been taxed, the court made the rule absolute to stay the proceedings in that action until the costs of a former ejectment should have been paid. The case of *Harvey d. Beal v. Baker* ⁽²⁾ is a still stronger authority. An ejectment having been brought in which the plaintiff failed, he brought a second, in which he succeeded, and signed judgment, and actually issued execution; but the court, nevertheless, stayed his proceedings until payment by him of the costs incurred in the former action. It is impossible, after those cases, to say that there has been any waiver here.

It has been further urged that there is no vexation in this case,

(1) 2 W. Bl., 1152.

(2) 2 Dowl. (N.S.), 75.

and that that is a test as to whether or not the court should in the exercise of its discretion grant this rule. It is not necessary, however, that vexation should be shown. The passage I cited from Tidd is abundant authority that the practice as to that has been settled for more than forty years. The undoubted rule is, that, where a party has once failed, he is not at liberty to try substantially the same question in a second action without first paying the costs of the former trial.

It was further contended that the persons who would receive the costs are not the persons who are defendants in this action, that the persons making this application are not the persons entitled to the costs, and that the costs in question are a charge upon the Tichborne estate and not upon the estate sought to be recovered in this action. The whole of that, however, is disposed of by the authorities to which I have referred, in one or other of which every one of the circumstances which are urged here existed and was dealt with. Where the plaintiff is the same, and the question to be tried is the same, the rule must go, unless there be some special circumstances to warrant a departure from the ordinary practice. That there are exceptions to the general rule there can be no doubt. Mr. Giffard referred to *Muller v. Gernon* (*), to show that a plaintiff resident abroad will not be compelled to give security for costs after the defendant has given an undertaking to accept short notice of trial. But there the defendant had delayed the proceedings by obtaining time to plead *on giving an undertaking to accept short notice of trial; and after that he sought further to delay the proceedings until security was given for costs. Under those circumstances, the court properly held that it was not competent to the defendant to make the application.

Mr. Giffard, further to show that the rule is not inflexible, referred to a case of *Doc d. Rees v. Thomas* (*), where, upon the master's report that there was ground for believing that the former verdict had been obtained by means of fraud and perjury, the court declined to stay the proceedings in a second action until the costs of the first were paid. But, in the case of fraud and perjury not discovered until after the trial, there is no limit to the power of the court to interfere. Indeed, I remember an instance where the court, after the lapse of several years, contrary to all its ordinary rules, granted a new trial, upon being satisfied that the verdict on the former trial had been obtained by fraud and perjury.

It was then insisted that the plaintiff was taken by surprise at the trial by the evidence given on the part of the defendants. But, the jury having, after an unusually protracted trial deli-

(*) 3 Taunt., 272.

(*) 2 B. & C., 622.

berately pronounced an opinion which was equivalent to a verdict for the defendants, the plaintiff's counsel acquiesced, and elected to be nonsuited. I therefore think that it is entirely beside the mark to talk about surprise, or that the plaintiff has not had an opportunity of fairly and completely trying the question at issue.

The only matter which remains to be considered is that relating to the notice to proceed. Can we permit that to stand whilst we make the rule absolute to stay the proceedings? The amount which the plaintiff will have to pay as the condition of his being allowed to go on with this action is undoubtedly large; and the plaintiff is, as Mr. Giffard has said, a bankrupt and in prison. But, from what has been disclosed on all the applications which have come before me, it is impossible to shut one's eyes to the fact that there are persons behind with whose money this litigation is carried on. It is the position of almost every person claiming an estate under circumstances like these that personally he is unable to pay the costs. The very object of granting these rules is to *protect a defendant from being [42] harassed by a second action to try a title upon which he has already succeeded, at a suit of a pauper; and, if the amount which the plaintiff is called upon to pay is a large one, it may on the other hand be said that the burden imposed upon the estate of the infant is still greater. Under all these circumstances, therefore, I think the right course will be to make it part of this rule that the time for proceeding to trial under the defendants' notice should be enlarged for a period of six months. If the requisite sum is not found by that time, it is not very likely to be found at all.

BYLES, J. I am of the same opinion. This matter came before me at chambers, and I have had an opportunity of considering it. The application now before us is, that the proceedings in this action may be stayed until the costs of the former action of *Tichborne v. Lushington* have been paid. My lord has gone fully into the authorities to show that the land need not be the same, or the defendant the same, provided that the question be the same. Here, we have the plaintiff precisely the same, the question to be tried precisely the same, and the same defendant in reality, although not nominally the same. It is true there was no verdict in the former case; but there is the unmistakeable expression of opinion by the jury, and the election of the plaintiff's counsel to be nonsuited, which for all practical purposes amounts to a finding of the jury. It seems to me that, according to all the decisions, we are bound to accede to this application.

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With regard to the notice to proceed given under s. 202 of the Common Law Procedure Act, 1852, I apprehend the meaning and effect of that is this — “Proceed according to the practice of the court, but subject to any obstacles which the law allows us to place in your way.” I cannot help feeling that, under some circumstances, though certainly not under those of the present case, it might be a hardship on the plaintiff to be prevented from proceeding until so large a sum has been paid. But all we can do is to administer the law as we find it. The same title being in question, and the parties being substantially the same, the plaintiff is so far bound by the decision in the former action that the litigation cannot proceed until the costs already incurred have been paid.

43] *BRETT, J. The plaintiff brought an action of ejectment, in which he failed, and the costs of which he was bound to pay. Another action is pending for the trial of precisely the same question which was at issue in the first action; and the defendants have made the ordinary application for a stay of the proceedings until the costs of the first action are paid. Upon such an application, I apprehend, the court is bound to consider not only the condition of the plaintiff, but that of the defendant also. This motion, it is true, involves the payment of a very large sum of money; but it must be remembered that the defendant — that is, the real defendant — has already been called upon to disburse a very large sum, and will be forced, if this action goes on, to incur considerable further expense, in defending his title against a claimant who is not in a condition to pay costs.

Mr. Giffard has urged several objections against the propriety of making this rule absolute. In the first place, he insisted that the case did not come within the ordinary rule, because the parties were not the same in both actions. He did not contend that the plaintiff was not the same, or that the question in issue was not the same: but he said that the defendants in the two actions were not the same. I think he failed to make that out. The infant heir is the real defendant in both actions. But, even if that were not so, *Doe d. Brayne v. Bather* ⁽¹⁾ is a distinct authority to show that it is not necessary that the defendants should be identically the same. The decision is founded on the fact of the plaintiff being the same, and the defendant being subjected to costs as against a plaintiff who is unable to pay costs, and who has not paid the costs of a former action in which precisely the same question was raised.

Mr. Giffard next contended that, even though the case *prima facie* fell within the rule of practice which has been referred to, the defendants have waived their right to avail themselves of

(1) 12 Q. B., 941.

it, on the ground that they have allowed the plaintiff to take steps since the former trial. But the cases cited by Mr. Matthews seem to me to be conclusive on that point. Indeed *Harvey d. Beal v. Baker* ⁽¹⁾ is a much stronger case than this. It was then said that the service of the notice to proceed, under s. 202 of the Common Law Procedure Act, 1852, operated as a waiver; and *Muller v. Gernon* ⁽²⁾ was *cited as an authority [44 for that position. But there the defendant had obtained an indulgence, and then sought to defeat the condition upon which it had been granted to him. Here, however, the defendants have obtained no indulgence. The notice was served in the ordinary course, and at the proper time. It was then said that the present application is inconsistent with that notice. I do not think it is. I do not see why the two may not stand together. I see nothing inconsistent in the court saying to the plaintiff, "You shall not proceed further with this action until you have paid the costs of the former action," notwithstanding he is bound by the notice under s. 202 to proceed to trial within twenty days, under pain of having judgment signed against him. If the amount of costs had been small, there would have been no pretence for suggesting any hardship. I therefore think Mr. Giffard has failed to show that the defendants have waived their right to apply for this conditional stay of the proceedings.

Then he submitted that this is an application to the discretion of the court, and that the rule upon which we are acting is not an inflexible one. *Doc d. Rees v. Thomas* ⁽³⁾ shows that the rule is not inflexible. I go further. If Mr. Giffard could have made out that by any act of the defendants, or any negligence on the defendants' part, the plaintiff was prejudiced to the extent of being prevented from having a fair trial upon the former occasion, although nothing approaching to fraud could be suggested, the court ought not to interpose to prevent a second trial. But I think he failed to make this out.

Upon the whole, I see nothing of which the plaintiff has a right to complain. His counsel deliberately elected to withdraw the case from the jury, after having had ample time to consider whether or not they had any answer to give to the case brought forward on the part of the defendants. They were entitled to adopt that course; and, if I might say so, I think they exercised a very wise discretion; and the plaintiff cannot now be heard to complain that he has not had a fair trial.

I therefore see no ground for taking this case out of the ordinary rule, and think the defendants are entitled to succeed upon this motion. But there is one peculiarity in this case which I think *justifies us in somewhat modifying the rule. I refer [45

⁽¹⁾ 2 Dowl. (N. S.), 75.

⁽²⁾ 3 Taunt., 272.

⁽³⁾ 2 B. & C., 622.

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to the large amount of costs which the plaintiff is called upon to pay, and to the fact of the defendants having served the plaintiff with a notice to proceed within twenty-one days, under s. 202 of the Common Law Procedure Act, 1852. The court has a right to take into consideration the fact that the defendants who make this motion to stay the proceedings are the persons who gave the notice to proceed. I quite agree with my lord, to whom all the facts are known, that the claimant is not entitled to any great sympathy on account of the largeness of the sum he is called upon to pay, seeing that the funds for the promotion of this litigation have notoriously been furnished by other people, who unless they are firmly convinced of the justice of the plaintiff's claim, are doing terrible injustice to the infant possessor of these estates. But I think, in common justice, the plaintiff should have an opportunity afforded him to obtain the means of paying the costs, and that the time for proceeding to trial in this action should be extended, as suggested by my lord.

GROVE, J., concurred.

Rule absolute.

Attorneys for plaintiff: *Gorton & de Fivas.*

Attorneys for defendants: *Collington & Slaughtier.*

Proceedings will be stayed in a second action until the plaintiff pays the costs of a former suit for the same cause of action against the defendant. *Edwards v. Ninth*, etc., 22 How Prac., 444; *Richardson v. White*, 27 Id., 155; *Kentish v. Tatham*, 6 Hill, 372; *Perkins v. Hinman*, 19 Johns., 237; *Ripley v. Benedict*, 4 Cow., 19; *Davis v. Duffie*, 5 Duer., 688; 3 Abb. Prac., 363. The order may, however, be refused if plaintiff satisfy the court, the second suit is not vexatious. 3 Cow., 380; 2 Johns. Chy., 461; 7 Paige, 53; 2 Cow., 580. Those who are privy to the first suit are equally bound as if they had been parties thereto.

Jackson v. Edwards, 1 Cow., 138. But an order to stay proceedings in a suit for equitable relief will not be granted on account of the nonpayment of costs on the dismissal of an action at law upon the same cause of action. *Davis v. Duffie*, 5 Duer., 688; 3 Abb. Prac., 363. The fact that additional defendants are included in the second suit will not prevent a stay. *Kentish v. Tatham*, 6 Hill, 372. But an ejectment suit by three plaintiffs will not be stayed on account of the nonpayment of the costs of a former suit by one of the plaintiffs to recover his third of the real estate. *Ten Broeck v. Reynolds*, 13 How Prac., 462.

(Law Reports, 8 Common Pleas, 46.)

Nov. 23, 1872.

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*TAPSCOTT and Others v. BALFOUR and Another.

Ship and Shipping—Charterparty—Demurrage—Lay Days, commencement of—“Load in the usual and customary manner”—Dock Regulations.

It was agreed by charterparty between plaintiffs and defendants that the plaintiffs' ship should proceed direct to any Liverpool or Birkenhead dock, as ordered by the defendants, and there load in the usual and customary manner a cargo of

coals, the vessel to be loaded at the rate of 100 tons per working day. The defendants directed that the ship should proceed to the W. dock, at Liverpool. Cargoes of coal are supplied at the docks at Liverpool through the agency of the agents for various collieries, and are most usually loaded in the W. dock from "tips," of which there are only two in the dock, and by the dock regulations no coal agent is permitted to have more than three vessels in the dock at a time. Though coal is generally loaded in the W. dock from tips, it can be, and not unfrequently is, loaded from lighters. The plaintiffs' ship was ready to go into the dock on the 3d of July, but was not allowed to enter because the coal agents employed by the defendants to supply the cargo had three vessels already in the dock, and two others in turn to go in. She was allowed to go into the dock on the 11th of July, but could not get under the tips for some time owing to the number of vessels in turn to go under them before her:

Held, in an action for demurrage on the charterparty, that the lay days did not commence at the time when the ship was ready to enter the dock, as contended by the plaintiffs, nor at the time when she got under the tips, as contended by the defendants, but at the time when she got into the dock.

Brown v. Johnson (10 M. & W., 331) followed.

DECLARATION for that it was by a certain charterparty agreed by and between the plaintiffs and the defendants amongst other things that the plaintiffs' ship *Emerald Isle*, of 1696 tons or thereabouts, then lying in the port of Liverpool, being tight, staunch, and strong, and every way fitted for the voyage, should with all possible dispatch proceed direct to any Liverpool or Birkenhead dock, as ordered by the defendants, and there load in the usual and customary manner a full and complete cargo of coals which the defendants bound themselves to ship not exceeding what she could reasonably stow and carry over and above her tackle, &c., and being so loaded should proceed to Valparaiso for orders to discharge at one safe port between Valparaiso and Callao both inclusive, or so near thereto as she might safely get and deliver the same in manner agreed by the said charterparty, certain perils and casualties during the said voyage excepted, freight to be paid on unloading and right delivery of the cargo at a certain *rate and in manner stip- [47] nated in the said charterparty, the vessel to be loaded by the defendants at the rate of 100 tons per working day, freighters having the option of naming the stevedore upon certain terms in the said charterparty agreed, and the cargo to be unloaded as customary at the average rate of forty tons per working day, and freighters to pay demurrage at the rate of 4*d.* per ton register per diem, except in case of riot, strike of pitmen or other unavoidable accident which might prevent the loading or delivery of the cargo — loading not to commence before the 1st of July. Averment of performance of conditions precedent. Breach: that the defendants, though not prevented by riot, &c., did not cause the said cargo to be loaded on board the said vessel according to the terms and at the date mentioned in the said charterparty.

Second count, for that in consideration that the plaintiffs

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would enter into and sign the charterparty in the first count mentioned, the defendants promised the plaintiffs that they would procure for the plaintiffs within a reasonable time in that behalf a certain order or certificate, to wit, an order or certificate which would enable the plaintiffs' said vessel to enter the said Liverpool or Birkenhead dock as ordered by the defendants pursuant to the charterparty, and there obtain a berth, and there load the said cargo of coal from the defendants or their agent. Averment of performance of conditions precedent. Breach: that the defendants did not, within a reasonable time in that behalf, procure for the plaintiffs an order or certificate which would enable the said vessel to enter the said dock as ordered, and there obtain a berth and load as aforesaid.

Common counts for demurrage, and money due on accounts stated.

The plaintiffs' particulars of demand claimed the sum of 593*l.* 12*s.* for twenty-one days' demurrage of the *Emerald Isle*, at 4*d.* per ton register, as per charterparty.

Pleas to first and second counts, denial of the promise, and the breach. To the residue of the declaration, never indebted, and set off.

Issues.

At the trial, which took place in the Passage Court of Liverpool 48] pool *before the assessor, the following facts were proved or admitted by the parties:

The defendants entered into the charterparty, the terms of which are set out in the declaration, with the plaintiffs for the charter of the plaintiffs' ship, *Emerald Isle*. The defendants ordered the vessel to proceed to the Wellington dock, at Liverpool, to load. On the 3d of July, the vessel was ready to go into the dock.

It appeared that the most usual mode of loading coal in the Wellington dock, is by means of "tips" or "spouts," of which there are two in the dock, and by the dock regulations, no ship is allowed to go into the dock without an order from a coal agent, and no coal agent is allowed to have more than three vessels in the dock at one time. The defendants' coal agents for the purpose of loading the *Emerald Isle* at the dock, were Messrs. Branckner & Co. An order to admit the *Emerald Isle* to the dock was given by Mr. Morgan, Messrs. Branckner & Co.'s agent, on the 29th of June, but the ship was not permitted to go into the dock until the 11th of July, on account of Messrs. Branckner and Co., having already three vessels in the dock, and two more upon the dock books for admittance before the *Emerald Isle*. On the 11th of July the *Emerald Isle* was permitted to go into the dock, but was not permitted to go under

the "spout" or "tip" until the 29th of July. She could not have commenced loading from the tips before the 23d of July, as other vessels were being loaded, five of them being the vessels of Messrs. Branckner & Co. On the 23d of July her turn arrived to go under the tips, but from that date to the 29th, she was not under the tips, as Messrs. Branckner & Co. had no coal for her. Other vessels, some of them being Messrs. Branckner's booked after the 3d of July, were put under the tips before the 29th of July.

From the 29th of July to the 7th of August, coals were loaded on board the ship, and it was admitted that her cargo might have been completed on the 8th; but if she had waited in the dock till that day, she would have been neaped, i.e., the state of the tides would have prevented her getting out of the dock for some time, and the captain therefore had her taken out of the dock and removed to a Birkenhead dock, where her loading was continued *from lighters, and completed by the [49 15th of August. It appeared that though the most usual method of loading in the Wellington dock was from the tips, the loading could be and was not unfrequently done from lighters.

On these facts the verdict was entered for the defendants, leave being reserved to the plaintiffs to move the Court of Common Pleas to enter the verdict for the plaintiffs for such sum as the court should think fit, upon the ground that there was evidence of the defendants' liability; the court to have power to draw inferences of fact.

A rule *nisi* was accordingly obtained.

Holker, Q.C., and *Gully*, showed cause. The question whether demurrage is due, and if so how much, depends on the question when the time of loading began. The plaintiff's contention is that it began on the 3d of July, when the ship was ready to go into the dock; the defendants contend that it did not begin until the 23d of July. In the latter case, the loading was complete within the proper time, and no demurrage became due. It will be contended that there was an implied promise to give an order to enable the ship to go into the dock and load as soon as she was ready to do so. It is submitted that no such promise can be implied. The only implied promise there could be, would be to give an order to enable her to go into dock within a reasonable time. The question what would be a reasonable time must depend on all the circumstances of the case. There is no finding of the jury here that the time was unreasonable; the order was given which enabled the plaintiffs' ship to enter the dock in the usual manner, according to the regulations in force. The fact that the ship was prevented from entering the dock until the 11th of July, did not arise from any

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fault of the defendants, but from the crowded state of the dock. The same considerations apply to the delay in the dock: the charterparty says that the ship is to load in the usual and customary manner. The usual manner of loading in the dock is from tips, and the practice is and must be, that vessels have to wait their turn at the tips. It is perfectly well known what the practice as to loading coal in the Liverpool docks is: that the coals are supplied by a limited number of agents for the Lan-50] cashire *collieries, and that the number of tips being limited, there are regulations as to the order of loading. The charterparty must be construed with reference to the well known course of business. There is no proof here that the time which elapsed was unreasonable.

With respect to the period subsequent to the ship's leaving the dock, the plaintiffs cannot recover. She might have been completely loaded by the 8th of August, but for the act of the captain in so removing her from the dock. It was unfortunate for the shipowner that the state of the tides was as it happened to be, but he cannot throw the consequences of that on the charterers. They cited *Leidemann v. Schultz* ⁽¹⁾.

Herschell, Q.C., and *Myburgh*, supported the rule. It is contended that upon the true construction of the charterparty there is a contract to give the plaintiffs an order for some dock, into which the ship can get when she is ready to load. It is said that the defendants could not do so, because the coal agents had already three vessels in the docks. The answer is, that this results from employing a particular coal agent. It was admitted that other vessels, booked after the plaintiffs', got loaded before her. It is unreasonable that the plaintiffs' vessels should have to wait, because the defendants choose to employ a particular agent, who happens to have a great many ships in turn for loading before plaintiffs.' The duties of both sides under the charterparty must be correlative. The vessel is to proceed at once to the dock; it must be the defendants' duty to get her loaded when ready. If this view be correct, the lay days commenced on the 3d of July.

[DENMAN, J. You must admit that it was for the charterer to select the coal agent. Can you put it higher than that he must not make an unreasonable choice? Then what evidence is there that he did so here?]

It lies on him to show that he could not have enabled us to load sooner by choosing some other agent.

[BOVILL, C.J. The reasonableness of the choice does not depend on the state of things when the vessel arrives. The charterer must give his orders beforehand in the ordinary course

(1) 14 C. B. 38; 23 L. J. (C.P.), 17.

of business. How could he know that the agent would have three vessels in the dock at the time?]

*But if a loss is to arise from circumstances of this nature, is it not more reasonable that the charterer who selects his own agent for his own purposes should bear it, than the shipowner, who has nothing to do with the agent?

Secondly, it is contended that in any case the lay days commenced on the 11th of July, the day of the ship's getting into the dock. The case of *Brown v. Johnson* ⁽¹⁾ is conclusive in the plaintiff's favor on this point. It was there held that the lay days commenced from the time of the vessel's getting into the dock, though from the crowded state of the dock she did not get to the place of unloading till later. The court held that the lay days commenced when the vessel had reached its usual place of discharge, which was the dock, and not any particular place in the dock.

The words "load in the usual and customary manner" cannot have the construction contended for by the defendants. They are part of the ordinary printed form of any charterparty, and cannot be construed as meaning that the lay days are only to commence when the vessel is under the tips. Calculated in this way, the demurrage would commence on the 3d of August, when the loading at the rate of 100 tons a day would have been complete if commenced on the 11th. Then with reference to the time to which it is to extend, it is submitted that it must extend to the 15th of August. The removal of the ship from the dock was not the independent act of the captain alone. The fair construction of the facts and correspondence is, that she was moved from the dock by arrangement for the benefit of both parties. If she had been neaped in the dock by reason of defendants' breach of contract, the damages would have been very much increased. Therefore, if the loading ought to have been complete by the 7th, the defendants are liable for this demurrage also. [The court intimated their opinion that the fair inference from the facts before them was that the removal of the ship from the dock had been by arrangement for both parties' benefit, and the defendants' counsel admitted that this must be taken to be so.]

[They also cited *Kell v. Anderson* ⁽²⁾; *Parker v. Winlow* ⁽³⁾; **Brereton v. Chapman* ⁽⁴⁾; *Lawson v. Burness* ⁽⁵⁾; *Robertson v. Jackson*. ⁽⁶⁾]

BOVILL, C.J. The questions which we have to decide in this case turn principally on the construction to be placed on the words of the charterparty. It is provided that the vessel "shall

(1) 10 M. & W., 331.

(*) 7 Bing., 559.

(2) 10 M. & W., 498.

(*) 1 H. & C., 396.

(3) 7 E. & B., 942; 27 L. J. (Q.B.) 49.

(*) 2 C. B., 412; 15 L. J. (C.P.), 28.

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with all possible dispatch proceed direct to any Liverpool or Birkenhead dock as ordered by charterers, and there load in the usual and customary manner a full and complete cargo of coals which they bind themselves to ship . . . The vessel to be loaded at the rate of 100 tons per working day."

The question arises when these working days were to commence. There is no express stipulation in the charter as to the time when the loading was to begin, and we must therefore consider what is the ordinary rule on the subject. The rule is, that when a port is named in the charterparty as the port to which the vessel is to proceed, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadstead where loading usually takes place. If, when she arrives there, the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port. Now, by this charterparty, the vessel was to proceed to any Liverpool or Birkenhead dock as ordered by the charterers. The charterers were to have the selection of the dock, and they accordingly selected the Wellington dock. It seems to me that the effect of such selection was precisely as if that dock had been expressly named in the charterparty originally, and the agreement had been that the vessel should proceed direct to the Wellington dock, and when there should load in the usual and customary manner. Now, great stress was laid on the words "in the usual and customary manner." These words are, however, only part of the ordinary printed form of charterparty, and must be taken, I think, to apply to the mode of loading, and not to the place to which the 53] shipowner undertakes that the ship shall *proceed. The meaning of *Lawson v. Burness* ⁽¹⁾ by Pollock, C.B., who says: "It appears to me the words 'customary manner' mean the mode of loading, whether by a lighter or at the wharf."

It would be giving such an expression a very extended construction to say that it applies to the place to which the shipowner undertakes the vessel shall proceed so as to increase his liability to the extent here contended for. The cases which may seem at first to bear out the argument of defendants' counsel are, it seems to me, distinguishable. In each of them there was an express stipulation as to the loading, and not merely the ordinary expression "load in the usual and customary manner." In the case of *Robertson v. Jackson* ⁽²⁾ the stipulation was, that the time should run from the time of the vessel being ready to unload and in time to deliver. All turned

⁽¹⁾ 1 H. & C., at p. 400.

⁽²⁾ 2 C. B., 412; 15 L. J. (C.P.), 28.

on those express words. So in *Leidemann v. Schultz* ⁽¹⁾ the vessel was to proceed forthwith to Newcastle-on-Tyne, and there be ready forthwith "in regular turns of loading" to take cargo; and in *Lawson v. Burness* ⁽²⁾ similar expressions were used.

All these cases depended on the express terms of the charter. In the present case, there being no express provision on the subject, the ordinary rule must prevail; and treating the charter, as I have before said it must be treated, viz. as though it provided that the ship should proceed direct to the Wellington dock, then any loss arising from the state of the dock must fall, according to the authorities, on the charterer, and not on the shipowner. On the other hand, if that view be correct the lay days did not commence till the vessel got into the Wellington dock. The charterparty gives the right of selecting one of several docks to the charterer, and the parties must be taken to have known the regulations affecting such dock. If by such regulations access to the dock might be delayed, the loss must fall on the shipowner, the charterer having the option of naming such dock. This case is not unlike that of *Kell v. Anderson* ⁽³⁾. There the ship was kept ten days at Gravesend because she was entered by the freighters for a meter, and consequently *was detained by the harbor master, and not al- [54] lowed to go up into the Pool till her turn arrived for a meter. It was held that the loss must be sustained by the shipowner. Mr. Herschell urged that, though the charterer might have a right to select a particular dock, he had no right to select a particular agent to load the ship. But who is to determine what agent is to be employed? We must take it that it was the usual course for vessels to be loaded through an agent, and that there was nothing unreasonable or exceptional in the course pursued in this respect.

In *Leidemann v. Schultz* ⁽¹⁾ the argument was employed that the ship might have loaded at a different spout. Counsel said in arguing: "The case shows that the defendants could have loaded the ship earlier had the ship been allowed to go to another spout;" but the lord chief justice answers: "Yes, but with different coke, and at a higher price; if the captain may choose at what spout he will load, he may next choose what articles he will load with. It was not left to the jury to say whether the charterer had sent the ship improperly to an incumbered spout." So here, I say, if it were intended to rely on anything unreasonable and improper in the selection of the agent, the defendants' counsel should have insisted on that question being left to the jury, but no such question having been submitted to them, and it being the usual course to employ an

⁽¹⁾ 14 C. B., 38; 23 L. J. (C.P.), 17. ⁽²⁾ 1 H. & C., 396. ⁽³⁾ 10 M. & W., 498.

agent, we must now assume that there was nothing unreasonable and improper in the selection that was made.

This disposes of the claim for demurrage so far as it depends on the contention that the lay days commenced on the 3d of July, and leaves it to depend on the contention that they commenced on the arrival of the ship in the dock on the 11th. I am of opinion that the lay days did commence on the 11th, and that the charterers' responsibility therefore dates from that time. A subordinate question was raised whether such responsibility continued during the time occupied by the vessel's going to a Birkenhead dock and completing her loading there. Of course if this had been done for the shipowner's convenience only he could make no claim in respect of the time so occupied, but it appears to me, looking to the circumstances of the case and the correspondence between the parties, that the proper inference to draw is that this cause was *adopted by mutual consent to avoid more serious loss. I am, therefore, of opinion that the verdict must stand for the whole amount of demurrage calculated from the time when the loading ought to have been complete if commenced from the time of the vessel's going into dock to the completion of her loading; that is to say, twelve days' demurrage amounting to 329*l.* 4*s.*

DENMAN, J. I am of the same opinion. I think the question when fully considered, turns chiefly on the construction of the charterparty. It seems to me on the true construction of that instrument that on the day when the ship arrived in the dock the shipowner had done all that he was bound to do. At first I doubted whether the words "usual and customary manner" might not have a larger signification than upon further consideration I am disposed to give them. The ship is to proceed direct to any Liverpool or Birkenhead dock as ordered by the charterers. That stipulation is fulfilled directly the ship arrived in the Wellington dock. She is then to load in the usual and customary manner. It is argued that those words import the consideration that the loading can only be done at a particular spot in the dock, and that there can be no liability for demurrage till the vessel reaches that spot. I do not think the evidence supported that view. There was evidence that the loading was not unusually effected, not from the spout but from lighters. It would, I think, be well within the terms of this charter if the loading had so taken place. If this be so, it is impossible to say that the words "usual and customary manner" are equivalent to a provision that demurrage shall not begin till the vessel has arrived at a particular spout. With re-

spect to the period up to which the demurrage must be calculated, I agree with my lord. *Rule absolute.*

Attorney for plaintiffs: *Wynne for Forshaw & Hawkins.*

Attorneys for defendants: *Chester, Urquhart, Bushby & Mayhew, for Norris.*

IN THE EXCHEQUER CHAMBER.

(Law Reports, 8 Common Pleas, 56.)

Nov. 28, 1872.

*JEWSBURY v. MUMMERY.

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Executor — Plene Administravit — Judgment of Assets — Devastavit — Assent of Creditors to misapplication of Assets — Estoppel.

In an action against an executor a plea of *plene administravit*, was pleaded, and the action having been referred, the arbitrator found against the defendant upon the plea, and the plaintiff accordingly signed judgment. The plaintiff afterwards brought his action upon the judgment against the defendant, suggesting a *devastavit*. The defendant sought to set up, by way of defence, facts which tended to show that, though assets had come to his hands before the judgment, and had been illegally appropriated, such misappropriation had taken place with the consent and concurrence of the plaintiff, and that he was therefore estopped from complaining of it:

Held (affirming the decision of the court below), that if the facts which the defendant sought to set up amounted to a defence, they might have been rendered available under the plea of *plene administravit*, and the defendant could not, therefore, set them up as negating the *devastavit*.

Appeal from the decision of the Court of Common Pleas, discharging a rule calling on the plaintiff to show cause why the verdict should not be entered for the defendant, or why a special case should not be stated between the parties, pursuant to leave reserved.

Declaration by the plaintiff, as the public officer of the Gloucestershire Banking Company, stated that a judgment had been recovered by the plaintiff, as such public officer, in the Court of Common Pleas against the defendant, as executor of William Shackleford, deceased, for the sum of 237*l.*, to be levied of the goods and chattels of the testator in the hands of the defendant, which judgment remained unsatisfied, and suggested a *devastavit* by the defendant of the goods of the testator which at the time of the judgment had come to the defendant's hands.

Pleas: 1. Not guilty; 2. For a defence on equitable grounds that the said acts complained of in the declaration were committed by the defendant with the full knowledge, approbation, privity, and concurrence and leave of the said banking company, and that the said company acted as the agents of the defendant in committing the same, wherefore the defendant says that the plaintiff ought not to be admitted to aver that the defendant

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Jewsbury v. Mummery.

57] eloigned, wasted and *converted, and disposed of the said goods: 3. The Statute of Limitations.

Issues thereon.

The trial took place before Willes, J., at the sittings after Michaelmas Term, 1870, in London. The plaintiff put in the judgment roll in the former action between the same parties. It appeared by the roll that this action was by the plaintiff, as public officer of the banking company, against the defendant, as such executor as aforesaid, for breach of a covenant made by the defendant's testator for repayment to the banking company of certain sums advanced by the company to the testator upon demand and for keeping up the payment of the premiums on certain policies of insurance. To this action the defendant pleaded, *inter alia*, a plea of *plene administravit*. It further appeared that the action had been referred by judge's order to an arbitrator, who found all the issues for the plaintiff; and also that a sum of 2374*l.* was due to him, as the public officer of the banking company, from testator's estate, and that the defendant, at the time of the commencement of the said action, and since, had assets of the testator in his hands to be administered to the value of the said sum of 2374*l.*, wherewith the defendant might have satisfied the plaintiff in such amount.

The plaintiff also put in the writs of *fi. fa.* issued to the sheriffs of Middlesex and Gloucestershire against the goods of the testator, and the return of *nulla bona* to such writs.

The defendant proposed to give evidence relating to the testator's estate, and the administration thereof, at a time previous to the said former action and judgment roll, to show the nature of the evidence on which the arbitrator to whom the said action was referred had made his award; and in particular he proposed to show that it had appeared before the said arbitrator that a banking account had been opened by the executors of the testator, of whom the defendant was the survivor, with the Gloucestershire Banking Company, to which account the company transferred a certain sum of money, the residue, after discharging the balance due from the testator on his current account, of the produce of a certain policy of assurance, by which the said current account was secured, that sums of money had been 58] paid into the said account to an amount *exceeding the whole amount of the debt remaining due to the said company from the testator's estate, and that the said company had permitted the whole amount so paid in to be drawn out by checks more than six years before this action, instead of applying the same to the payment of the testator's debt. That some of the said checks appeared by their form to be payments on account of other than specialty debts, and, further, that the defendant had

not in his actual possession any assets of the testator within six years before this action; but the learned judge held that the defendant was estopped by the judgment from denying that he had, at the date thereof, assets in his hands of the testator, out of which he might have satisfied the plaintiff's debt, and that the proposed evidence could not be given.

The verdict was entered by agreement for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him on the understanding that the court was to deal first with the question of estoppel, and that if the court should hold that the defendant was not estopped from giving the proposed evidence, then the facts should be stated in the form of a special case. A rule *nisi* was accordingly obtained to show cause why the verdict should not be entered for the defendant, or why a special case should not be stated between the parties, on the ground that the defendant was misled by the conduct of the plaintiff in the distribution of the assets, and the plaintiff was thereby precluded from complaining of the insufficiency of assets, and that the defendant was at liberty to show, and did show of what the *devastavit* complained of consisted, and that it was barred by the Statute of Limitations, and was not estopped from so doing by the judgment against him.

This rule was discharged by the Court of Common Pleas, against whose decisions the defendant appealed.

Giffard, Q. C. (*W.G. Harrison* with him), for the defendant, the appellant. The defendant now seeks to show that there has been no *devastavit* as against the plaintiff; that the acts which are alleged to amount to one consisted of the application of assets to simple contract debts, and that such application took place with the consent and concurrence of the banking company, and the *defendant was thereby misled in the [59] distribution of the assets; and therefore the plaintiff, as representing the company, is estopped from complaining of it.

[*KELLY*, C.B. Ought not the defendant to have availed himself of this defence under the plea of *plene administravit*?

BRAMWELL, B. You seek to say that the defendant did not waste the assets after the judgment, because he wasted them before, with the plaintiff's consent?]

It is contended that the defendant could not have availed himself of this defence under the plea of *plene administravit*. The former action is not against the defendant in his personal capacity, but merely as representing the estate of the testator, and the only question on the plea of *plene administravit* is, whether there were assets, and whether they have been legally appropriated. It is only when the plaintiff proceeds against the exe-

cutor in his personal capacity, and complains of a misappropriation of assets, that the executor can show, in answer, that though there were assets, and there was such a misappropriation, the plaintiff is estopped from taking advantage of it because he consented to it. The equity out of which the estoppel arises attaches to defendant in his personal capacity only.

[BLACKBURN, J. It seems to me that, if there be an estoppel now, there was equally one under the plea of *plene administravit*.]

[He cited notes to *Wheatley v. Lane* ⁽¹⁾; *Mara v. Quin* ⁽²⁾.]

Anstie, for the plaintiff, the respondent, was not called upon.

KELLY, C.B. I am of opinion that the judgment of the Court of Common Pleas should be affirmed. In this case the plaintiff commenced an action against the defendant as executor to recover the amount of the debt, and to this action there was a plea of *plene administravit*. The issue on that plea was found for the plaintiff. The plaintiff then proceeds upon the judgment, suggesting a *devastavit*, and the defence now sought to be set up is that, although before the judgment assets had come to the hands of the executor, and were not legally appropriated to the payment of debts, such misappropriation took place with the consent, or perhaps even at the instance of the plaintiff; and (60) consequently, *with respect to the moneys so appropriated there is nothing which he can now rely upon as a *devastavit*. The question arises whether the facts now offered in evidence to negative the *devastavit* could not have been offered in evidence before the arbitrator on the plea of *plene administravit*, and if they could, whether they are not now inadmissible. Now, it seems to me that, if these facts amount to an answer to the suggestion of a *devastavit*, it is because they show that as against the plaintiff this money must be treated as having been legally appropriated; and the same defence, based upon the very same facts, might have been raised upon the plea of *plene administravit*. If the defendant could have shown before the arbitrator that, though assets had come to his hands, he had parted with them under circumstances which precluded the plaintiff from alleging that they had not been duly administered, clearly that would have been a defence under the plea of *plene administravit*. Therefore one of two things must have been the case; either the evidence upon which the defendant now seeks to rely was not offered before the arbitrator upon the plea of *plene administravit*, and then the issue on that plea was rightly found against the defendant; or if offered, the arbitrator must have considered that the facts proved did not amount, as against the plaintiff, to a due administration of the assets that had come to the de-

(¹) 1 Wms. Saund., 219 c, 219 d.

(²) 6 T. R., 1.

fendant's hands. If they had amounted to such an administration, the defendant would clearly have been entitled to have the issue found for him.

If it be the case that the defence now sought to be set up would have been available under the plea of *plene administravit*, it is clear, upon the general principles of law, that the defendant, having omitted to set it up when he might have done so, cannot now avail himself of it. It would go to negative the correctness of the judgment that the plaintiff has obtained in the former action, and to show that he was not entitled to succeed upon the plea of *plene administravit*. It appears to me that there cannot be any substantial doubt that the defendant is estopped from setting up any such defence.

BRAMWELL, B., concurred.

CHANNELL, B. I am of the same opinion. The facts of the *case are short and simple, and there does not seem to me [6] to be much difficulty in arriving at a conclusion upon the point raised before us.

In the former action there was a plea of *plene administravit*, upon which issue was joined. It was clear that assets had come to the defendant's hands as executor, and the question was whether he had fully administered them. These sums of money were, no doubt, not properly appropriated, because they were applied to simple contract debts while there were specialty debts outstanding. Now, if the defendant could rely upon the fact that such misappropriation took place at the plaintiff's request, or under circumstances in which the plaintiff had misled the defendant into so applying them, it is clear that this would go to show that these sums of money were not, as between the plaintiff and the defendant, assets in the hands of the defendant. It is impossible, it appears to me, to contend that these facts, if a defence, could not have been set up under the plea of *plene administravit*. That being so, it appears to me that the defendant cannot now set them up under a traverse of the *devastavit*.

BLACKBURN, J. I am of the same opinion. It cannot, I think, be contended that, if the defendant had an opportunity of relying upon these facts as a defence in the former action, he can now, having let such opportunity go by, set them up as a defence as negating a *devastavit*. The rule of equity was held to be in this respect the same as that of law as long ago as Lord Hardwicke's time in the case of *Ramsden v. Jackson* ⁽¹⁾. The simple question, therefore, is whether the defendant could have made use of these facts as a defence in the former action. It is

⁽¹⁾ 1 Atk. 292.

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clear that moneys forming part of the testator's estate came to the defendant's hands and that the application of them was *prima facie* illegal as against the plaintiff; but the defendant seeks to show, as a defence, that such misapplication was with the plaintiff's own consent. It appears to me that, if the facts the defendant now seeks to set up amount to a defence, he could have availed himself of it under the plea of *plene administravit*. In the case of *Cooper v. T aylor* ⁽¹⁾ Maule, J., distinctly held that the question under the plea of *plene administravit* is whether there [62] are assets in the hands of the *executor available for payment of plaintiff's debt. So also, in *Richards v. Browne* ⁽²⁾, Tindal, C.J., expressly lays it down that, if in the distribution of assets a creditor misleads an executor, either by laches or by express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets. It is clear, therefore, that the defence now relied upon might have been set up before the arbitrator. That being so, it is immaterial whether it was in fact set up or not.

CLEASBY, B. I am of the same opinion. What the declaration complains of is a wasting of assets after the judgment, whereas the defence is directed to acts which took place before.

ARCHIBALD, J. I am also of opinion that this judgment must be affirmed. It seems to me clear, on the authority of *Richards v. Browne* ⁽²⁾, that the defence sought to be set up might have been set up under the plea of *plene administravit*; and the issue on that plea having been found against the defendant, he is now precluded from setting it up. *Decision affirmed.*

Attorney for plaintiff: *Tuttam*.

Attorneys for defendant: *Stevens, Wilkinson, & Harries*.

⁽¹⁾ 6 M. & G., 980.

⁽²⁾ 3 Bing. N. C., 493.

[Law Reports, 8 Common Pleas, 64.]

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*SMALE V. BURR.

Bill of Sale — Cancellation — Substitution — Registration — Stat. 13 Eliz. c. 5 — 17 & 18 Vict. c. 36.

In June, 1871, P. assigned furniture and stock-in-trade to S. by an absolute bill of sale, as security for an advance of 20*l*. This bill of sale was not registered, but, before the expiration of the twenty-one days allowed by 17 & 18 Vict. c. 36 for registration, a second bill of sale was substituted for it; and the same ope-

ration was from time to time repeated down to the 15th of July, 1872, P. continuing all the time in possession and dealing with the goods as his own, and the 20*l.* being still a subsisting debt. The last bill of sale (which alone was stamped, and the consideration for which was stated to be a present advance of 20*l.*) was duly registered on the 1st of August, 1872:

Held, that the bill of sale so registered was available against the claim of an execution creditor of P., that there was a sufficient consideration for it, and that it was not avoided by 13 Eliz. c. 5.

On the 2d of October, 1872, certain stock in trade and furniture were seized under an execution at the suit of the now defendant upon a judgment obtained by him against one Joseph Price, trading under the name of Alfred Twiss. The goods were claimed by the present plaintiff under a bill of sale; and a portion of them was also claimed by one Agnes Twiss, the sister-in-law of Price, as being her property. Upon an interpleader summons, an issue was directed by a master as between the now plaintiff and the execution creditor; the claim of Agnes Twiss being barred.

The issue was tried before Byles, J., at the last sitting at Westminster in this term. The facts proved were as follows: The bill of sale under which the plaintiff claimed, and which purported to be an absolute assignment of the goods in question to him by Price and Agnes Twiss in consideration of an advance of 20*l.* by the plaintiff to Price "on or about the day of the execution" of the instrument, bore date the 15th of July, 1872, and was registered on the 1st of August; and on it was indorsed a receipt for 20*l.*, signed by the plaintiff and dated the 15th of July, 1872. No such sum was in fact advanced by the plaintiff on that day: but, in June, 1871, the plaintiff did lend Price 20*l.*, as a security for which a bill of sale was given in the same form as the bill of sale in question. The security was renewed from time to time, about *fifteen or sixteen bills of [65 sale having been executed between June 1871, and the 15th of July 1872, all in the same forms, none of them being stamped or registered, and Price continuing all the time in possession of the goods, and carrying on his trade as before.

It was contended on the part of the defendant that the consideration for the bill of sale of the 15th of July, 1872, was untruly stated; that, the property in the goods having passed out of Price by the first bill of sale in June, 1871, there was nothing upon which the last could operate: and that the transaction was fraudulent and void by the statute of 13 Eliz. c. 5.

The learned judge ruled that the misstatement as to the consideration was immaterial, that the property in the goods had not passed from Price by the first bill of sale, and that the statute of Elizabeth was only material in case of bankruptcy, and that the only question for the jury was whether or not the last bill of sale was *bonâ fide*. The jury found for the defendant.

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McIntyre, Q.C., (*F. M. Wetherfield* with him), moved for a new trial on the ground of misdirection. The system of renewing bills of sale before the expiration of the time allowed by 17 & 18 Vict. c. 36 for registration, is resorted to by the lender for the purpose of defeating creditors.

[*BOVILL, C.J.* And protecting himself.]

The original bill of sale having passed the property in the goods from the grantor and vested it in the grantee, there could be no valid consideration for the one which was ultimately registered.

[*BOVILL, C.J.* If you rely upon the former bills of sale, not for a collateral purpose, but as evidence of an assignment, you are met by the difficulty that they are unstamped. There are at least two cases which are against you.]

Not exactly. In *Hollingsworth v. White* ⁽¹⁾, the bill of sale first executed by Phillips, the grantor, contained a proviso for redemption if the sum advanced was paid on a given day or any further or extended day to be agreed upon; and Cockburn, C.J. said: "it is true that the property in these goods passed from Phillips at the time he executed the [first] bill of sale: but the 66 execution of the *other bills was but an exercise of the right of redemption, whereby he redeemed the goods and granted a fresh security." Here, however, the first bill of sale was an absolute assignment of the property.

[*BRETT, J.* Did not the substitution of the second and subsequent bills of sale here amount to the same thing?]

Then, the consideration for the last bill of sale was untrue stated. It was admitted that there had been no advance of 20% by Smale to Price "on or about the day of the execution" of that instrument.

[*GROVE, J.* Subject to the difficulty as to the date, there was in point of fact the consideration stated.]

The giving of the successive bills of sale, and allowing the grantor to retain possession of the goods and to deal with them as his own in a manner inconsistent with the bill of sale, was evidence of fraud, which ought to have been submitted to the jury. In *Edwards v. Harben* ⁽²⁾, it was held that, if a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the meantime the debtor die, whereupon the creditor takes and sells the goods; he will be liable to be sued as executor *de son tort* for the debts of the deceased; for, the debtor's continuing in possession is inconsistent with the deed, and fraudulent as against creditors. In giving judgment, Buller, J., said ⁽³⁾: "Here, the bill of sale was upon the face of it absolute, and to

(1) 6 L. T. (N.S.) 604.

(2) 2 T. R., 587.

(3) 2 T. R. at p., 596.

take place immediately, and the possession was not delivered; and the case of *Bamford v. Baron* ⁽¹⁾ makes a distinction between deeds or bills of sale which are to take place immediately and those which are to take place at some future time. For, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule, as *accompanying and following* the deed. That case has been universally followed by all the cases since."

BOVILL, C.J. I regret that we are obliged by our judgment to sanction a practice so detrimental to the interests of the revenue and so calculated to defeat and delay creditors. But the principles *upon which the courts have acted in these cases [67 compel us to refuse this rule.

No doubt, the first bill of sale would be perfectly valid as between the parties, and would be wholly unaffected by the absence of registration. The want of a stamp would only go to its admissibility. Then, what was the effect of the substitution of the second bill of sale for the first? It seems to me that it amounted to a cancellation of the previous bill of sale, at all events as between the parties themselves. It is true that the Court in *Hollingsworth v. White* ⁽²⁾ said that the execution of the subsequent bills of sale was but the exercise of a right of redemption: but, in substance, they treat the execution of the second bill of sale as a virtual cancellation of the first, and the execution of the third as a cancellation of the second, leaving the last good as against the execution creditor; for, Cockburn, C.J., in giving judgment, says: "There was a virtual annulling of the first and second bills of sale, whereupon a third good and valid bill of sale was executed, which, according to *Murples v. Hartley* ⁽³⁾, was good as against the execution creditor, although not filed when the goods were seized." The principle of that decision is applicable here. If each of the subsequent bills of sale be held to annul the previous one, the result is that the original consideration is sufficient to sustain the last. As between the parties, therefore, the property passed under the last bill of sale; and, the requirements of the statute as to registration having been observed, the last bill of sale became good also as against the execution creditor. It seems to me that my Brother Byles was quite right, and that there should be no rule.

In addition to *Hollingsworth v. White* ⁽²⁾, I would refer to *Edwards v. English* ⁽⁴⁾, which is very much to the same effect.

⁽¹⁾ 2 T. R., 594, n.

⁽²⁾ 6 L. T. (N.S.), 604.

⁽³⁾ 3 E. & E., 610; 30 L. J. (Q.B.), 92.

⁽⁴⁾ 7 E. & B., 564; 20 L. J. (Q.B.), 193.

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There, a bill of sale of goods was *bonâ fide* made by J. H. to F. H. by way of security, and was filed, but with an affidavit which turned out to be defective; and a subsequent bill of sale of the same goods, subject to that to F. H., was *bonâ fide* made by J. H. to E. by way of security, and was properly filed: and upon an interpleader issue it was held that the goods were not seizable by the sheriff as against E. And Crompton, J., said: "It is impossible to put the construction upon the act, that the execution creditor for some purposes wishes to treat the first bill of sale as a void transaction as against him; but, at the same time, in order to impeach the last bill of sale, he seeks to set up the first as a valid assignment of the goods by the debtor. The difficulty of so dealing with the matter has already been pointed out. Upon the whole, I think the correct conclusion has been arrived at, and that there should be no rule."

BRETT, J. In this case the defendant took in execution the goods of one Price. The plaintiff claimed them under a bill of sale given to him by Price on the 15th of July, 1871, and duly registered under the statute. If in other respects valid, it is conceded that that bill of sale was good as against the execution creditor, unless it is avoided for one of two reasons,—first, that it was given without consideration; secondly, that it was given with intent to defraud Price's creditors. It appears that it was given as a final bill of sale, after a series of fifteen or sixteen, each being intended to secure an original loan of 20*l*.

My Brother Byles was asked to tell the jury that there was no consideration for the last bill of sale, and that it was void under the statute 13 Eliz. c. 5. Authority is not wanting to show the real meaning of these transactions. The first bill of sale was not registered. Another was given in substitution for it. *Hollingsworth v. White* ⁽¹⁾ shows that that amounted to a cancellation or annulling of the first. The 20*l*. however, still remained a debt, and the goods continued in the possession of the grantor. Although, therefore, the property might have passed by the first bill of sale, yet, if the parties chose to annul it, the property in the goods would pass back to the grantor, and the debt still existing, it became, upon the construction put upon the statute by *Hollingsworth v. White* ⁽¹⁾, a good consideration for the second bill of sale: and so of the rest. Then, was the learned judge right upon the question of fraud? He was asked to tell the jury that the last bill of sale was fraudulent and void as

⁽¹⁾6 L. T. (N. S.), 604.

against the execution creditor. He declined to do this, *but [69 left it to the jury to say whether there was fraud as between the plaintiff and Price, that is, whether as between the plaintiff and Price it was *bonâ fide* intended that the property in the goods should pass by the bill of sale. That clearly was the proper and only question to leave to them. If the property was intended to pass to the plaintiff by the bill of sale, there was no fraud; for, fraud as against creditors generally, or as against the execution creditor (there being no bankruptcy), was immaterial. Upon no other ground could it be contended that the bill of sale was void. The ruling and the verdict were therefore right.

GROVE, J. I come with great reluctance to the same conclusion. I have tried, but in vain, to find some ground for impeaching a transaction which I feel to be a fraud upon the statute. Twenty-one days are given to the grantee to register a bill of sale: and this indulgence is taken advantage of to evade the object of the statute. A friendly creditor lends money to a needy person, taking by way of security a floating paper which may or may not be registered as a bill of sale, but which is renewed from time to time before the expiration of each period of twenty-one days by substituting a fresh one; and the creditor, by causing the last to be registered, not only defrauds the revenue, but also defeats the object of the statute, which was the protection of persons who might be dealing with the grantor upon the faith of his apparent ownership of the goods. The transaction certainly is one which is much to be deprecated: but I can find in law no answer to the plaintiff's claim. The last bill of sale having been duly registered, it operated as a valid transfer, and was good as against the execution creditor.

DENMAN, J. I am of the same opinion. I should have been extremely glad if I could have found an authority which would have enabled us to defeat this bill of sale. But I find none.

Rule refused.

Attorney for defendant: *J. Wetherfield.*

[Law Reports, 8 Common Pleas, 70.]

*LEA v. WHITAKER.

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Nov. 20, 1872.

Agreement for the Sale of a Public-house — Penalty or Liquidated Damages — Pleading.

An agreement for the sale of the trade-fixtures, &c., of a public-house by W. to L. at a fair valuation, contained the following stipulations: that, in addition to the amount of the valuation, L. agreed to pay W. 50*l.* goodwill; that L. was to be allowed to take, in the event of him leaving, the said sum of 50*l.*; that L.

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should pay to W. 100*l.* for painting, &c.; that the rent was to be 75*l.* yearly; that six months' notice to quit should be given by either party; and that, "by way of making this agreement binding, each of the above contracting parties have deposited in the hands of H. the sum of 40*l.* each; and either party failing to complete this agreement shall forfeit to the other his deposit money as and for liquidated damages."

In an action by L. against W. for refusing to sell pursuant to the agreement "whereby the plaintiff had lost the advantage which would have accrued to him from the performance of the agreement by the defendant, and had lost the use of the money paid by him as such deposit as aforesaid;"

Held, that the plaintiff's remedy for the breach was confined to the recovery of the 40*l.* deposited with H.

Plea, that the plaintiff sued H. for the two sums of 40*l.* deposited with him "as and for liquidated damages in respect of the said breaches, and recovered judgment in respect thereof."

Held, no answer to the action.

THE first count of the declaration stated that it was agreed in writing between the plaintiff and the defendant in the words and figures following, that is to say: "Memorandum of agreement made this 20th of May, 1871, between William Whitaker and James Lea, of &c., whereby W. Whitaker agrees to sell and James Lea to purchase the trade-fixtures, household furniture, and effects at the New Inn, Hunslet Road, Leeds, at a fair valuation to be made by Henry Hargreaves and Thomas Weatherby, or their umpire, whose decision shall be final; the rent, rates, and licences to be proportioned and paid in the usual manner: That, in addition to the amount of such valuation, the said James Lea agrees to pay unto W. Whitaker the sum of 50*l.* goodwill: The said James Lea is to be allowed to take, in the event of him leaving, the said sum of 50*l.*: And that further it is agreed that James Lea shall pay unto W. Whitaker the sum of 100*l.* for painting, &c.: The rent to be, including the cow-stable, 71*l.* the sum of 75*l.* yearly to *be paid quarterly; and six months' notice, to expire at the end of the then current year to be given by either party: And, by way of making this agreement binding, each of the above contracting parties have deposited in the hands of Henry Hargreaves the sum of 40*l.* each; and either party failing to complete this agreement shall forfeit to the other his deposit money as and for liquidated damages; possession to be given and money to be paid on or before the 19th day of June, 1871."

Averment, that, although all times had elapsed and all conditions precedent had been performed, and all things had happened, necessary to entitle the plaintiff to have the agreement carried out and performed on the defendant's part by the defendant, and to maintain the action for breach thereof: yet the defendant had wholly made default therein, and had refused and still did refuse to sell to the plaintiff the trade fixtures, &c., pursuant to the agreement, and to carry out and perform the

agreement on his part to be carried out and performed : Whereby the plaintiff had lost the advantages which would have accrued to him from the performance of the agreement by the defendant, and had lost the use of the money paid by him as such deposit as aforesaid, and had incurred expense in endeavoring to procure the performance of the agreement by the defendant.

Sixth plea, to the first count that, in pursuance of the alleged agreement, the plaintiff and defendant deposited in the hands of Hargreaves the sum of 40*l.* each, and that afterwards the plaintiff alleged that the defendant had committed divers breaches of the agreement, which breaches were the breaches now sued for, and claimed from Hargreaves the two several sums of 40*l.* deposited in his hands as and for liquidated damages in respect of the said breaches ; and, Hargreaves refusing to deliver to the plaintiff the said several sums the plaintiff commenced and prosecuted an action in this court for and in respect of the said several sums, and recovered judgment in respect thereof.

The defendant also demurred to the first count, on the ground that the plaintiff's remedy was confined to the recovery of the money in the hands of Hargreaves. Joinder.

The plaintiff demurred to the sixth plea, on the ground that the plaintiff is entitled, notwithstanding the allegations in the plea, to maintain the action. Joinder.

*Nov. 28. *A. L. Smith*, for the plaintiff. Upon the true [72 construction of the agreement set out in the declaration, the plaintiffs' remedy for a breach is not confined to the 40*l.*, but he may recover damages to the extent of the real injury he has sustained. In *Icely v. Grew* ⁽¹⁾ it was held that, where, in a contract of sale entered into at an auction, one of several stipulations is that, if the purchaser shall fail to comply with any of the conditions, the deposit shall be forfeited as liquidated damages, such condition forms no qualification of the general promise to complete the purchase, but the vendor may recover general damages for a breach. Numerous cases, from *Kemble v. Farren* ⁽²⁾ downwards, have decided that, where a covenant or agreement is entered into for the performance of several things, and a lump sum is to be paid in case of a failure to perform it, such sum is to be considered as a penalty, although the parties may have expressly stipulated that it shall be liquidated damages. That rule was acted upon in *Galsworthy v. Strutt* ⁽³⁾, *Betts v. Burch* ⁽⁴⁾, and *Sparrow v. Paris*. ⁽⁵⁾ Bramwell, B., in giving judgment in the last mentioned case, says ⁽⁶⁾ :

⁽¹⁾ 6 N. & M., 467.

⁽²⁾ 6 Bing., 141.

⁽³⁾ 1 Ex. 659 ; 17 L. J. (Ex.), 226.

⁽⁴⁾ 4 H. & N. 506 ; 28 L. J. (Ex.), 267.

⁽⁵⁾ 7 H. & N. 594 ; 31 L. J. (Ex.), 137

⁽⁶⁾ 7 H. & N. at p., 599.

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"The question is, is this a sum of money recoverable? Is it, as popularly expressed, a penalty or liquidated damages? It is a sum payable on one event. It is not a sum to secure the performance of several matters. This is the distinction on which the question turns,—the names the parties give the money, penalty or liquidated damages, are immaterial." And see the cases collected in Mayne on Damages, 2d ed. 100–104. Here there are many events on the happening of which the 40*l.* deposit is to be forfeited. It never could have been contemplated by the parties that the plaintiffs' remedy for the non-payment of the 50*l.* for goodwill and the 100*l.* for painting should be limited to the deposit.

[GROVE, J. The more probable intention of the parties was, that, in the event of either backing out before anything was done, his deposit should be forfeited.]

Patchett (Day Q.C., with him), contra. It is perfectly consistent with the declaration that the defendant declared off five 73] minutes *after the signing of the agreement, and before the time had arrived for anything to be done by either party under it.

In *Sainter v. Ferguson* ⁽¹⁾, Cresswell, J., says: "If there be only one event upon which the money was to become payable, and there be no adequate means of ascertaining the precise damage that may result to the plaintiff from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty." This the parties have done here. All that the declaration complains of is that for which the 40*l.* was to be paid. The forfeiture of that precise sum is, as is observed by Lord Mansfield in *Lowe v. Peers* ⁽²⁾, "the essence of the agreement."

[KEATING, J. The real question after all is, what did the parties intend?]

A. L. Smith was heard in reply.

Cur. adv. vult.

NOV. 29. KEATING, J. In this case, which was argued yesterday, we have come to the conclusion that the declaration is bad. It sets out an agreement for the sale, by the plaintiff to the defendant, of a public house, whereby several things are to be done by the plaintiff, whereas all that is to be done by the defendant is merely to assign the premises to the plaintiff; and then comes this provision: "And, by way of making this agreement binding, each of the above contracting parties have deposited in the hands of H. Hargreaves the sum of 40*l.* each: and either party failing to complete this agreement shall forfeit to the other his deposit-money as and for liquidated damages." Now, it ap-

⁽¹⁾ 7 C. B., 716, at p. 730; 18 L. J. (C. P.), 217.

⁽²⁾ 4 Burr., 2225.

pears on the face of the declaration that the parties, at or before the execution of the agreement, had each paid 40*l.* into the hands of Hargreaves; and the question for us to determine is whether that sum was agreed to be the liquidated damages which either was to pay to the other on failure to perform the contract.

The cases upon the subject of penalty or liquidated damages are very numerous. The result of them seems to be this, that what the courts look at is, the real intention of the parties as it is to be gathered from the language they have used. No case that I am aware of has decided that, if it be manifest that the parties meant the sum fixed to be liquidated damages, *the [74 court will interfere to frustrate that intention.

In many cases it has been held that the parties could not have meant what they have apparently said; as, for instance, where a number of things are stipulated to be done, it has been held that the parties could not have meant that a large sum should be payable as liquidated damages for a failure to perform one or more of them. Looking at the language of this agreement, I come to the conclusion that the parties did intend the 40*l.* to be paid as and for liquidated damages for the breach of the agreement by either of them. I infer this from the fact that the 40*l.* has been placed in the hands of a stake holder, as the agent of both. That reduces it to this, that the 40*l.* has already been paid by the defendant into the hands of the plaintiff's agent as and for liquidated and ascertained damages for the breach of the agreement by the former.

My Brother Grove has called my attention to a case of *Reilly v. Jones* (¹), which is very like the present, save as to the amount of the deposit. The defendant there agreed to take an assignment of the plaintiff's public-house and premises without requiring the lessor's title, that he would pay 2300*l.* for it, take the goods, fixtures, and effects at a valuation, and take possession of the house on or before the 29th of September; and the plaintiff agreed to give up possession of the premises, effects, and stock by that day, to assign licences, to repair or allow for all damaged outside windows, and to clear rent, taxes, and outgoings to the day of quitting possession; and then came the following: "and that either of them not fulfilling all and every part, the party not fulfilling shall pay unto the other the sum of 500*l.* hereby settled and fixed as liquidated damages; the deposit now paid (50*l.*) to be considered as part of the said damages, in case of default made by Jones, or returned in addition to the said damages, in case of default made by Reilly." It was there sought to treat the 500*l.* as a penalty, and to limit the plaintiff's

(¹) 1 Bing., 302.

verdict to the amount of damages actually sustained; but the court held that, upon the whole agreement taken together the clear intention of the parties was that it should be taken as liquidated damages, and that effect must be given to that intention. I am not aware that that case has been at all shaken by any subsequent authority. The result is that, as I collect the 75] real *intention of the parties to be that the 40*l.* was to be taken as liquidated damages, I hold the declaration to be bad. I think the plea is equally bad; it does not hit any point in the declaration. I therefore think there should be judgment for the defendant on the demurrer to the declaration, and judgment for the plaintiff on the demurrer to the plea.

GROVE, J. I am of the same opinion. The true principle to be extracted from all the decisions is, that the court must in each case gather from the whole instrument what was the real intention of the parties. *Reilly v. Jones* ⁽¹⁾ is as nearly as possible *quatuor pedibus* with the present case. The distinction between them, if any, rather makes an *d fortiori* case. The language of the stipulation for the deposit of 40*l.* by each party in the hands of Hargreaves, looks as if that was the agreed amount of damage which the stakeholder was to pay over to either of them upon a breach of the agreement by the other. That would apply equally whether on breach of one stipulation in the agreement or of the whole. It rather seems to me, however, that it means a substantial breach; and that seems to have been the ground upon which the decision in *Reilly v. Jones* ⁽¹⁾ proceeded; for, Dallas, C.J., in the course of the argument, asks ⁽²⁾: "If the damage occasioned by breach of the most material provision amounted to more than the stipulated sum, could not the party refuse to pay more?" In the agreement there, there were several stipulations; but the substantial bargain was for the taking and assigning of the public house, the others being subordinate stipulations. And, although Park, J., lays some stress upon the absence of any authority to show that "where the parties have themselves employed the expression liquidated damages, the court has holden the plaintiff should not recover, on breach of the agreement, the sum named as stipulated damages," ⁽³⁾ yet he goes on to say: "I will not say there is no such case; but looking at the agreement itself in the present instance, I found my opinion on what appears to be the clear intention of the parties;" and he concludes his judgment thus: "The decisions 76] all concur in laying it down that the intentions of the *parties ought to be pursued; and about those intentions there can

⁽¹⁾ 1 Bing., 302.

⁽²⁾ 1 Bing. at p. 304.

⁽³⁾ Said to have been overruled as to this, in *Mayne on Damages*, 2nd ed 104

be no doubt in the present instance." I found my opinion on the same ground. That case was cited in *Kemble v. Farren* ⁽¹⁾, which is the leading case the other way, and not controverted. Spankie, Serjt., there puts the decision in *Reilly v. Jones* ⁽²⁾ on the ground that the whole object of the agreement was that the defendant should transfer to the plaintiff his interest in the public house. So here, the main object of the agreement was that Whitaker should sell and Lea should purchase the goodwill, &c., of the public house; and, if either party drew back, he was to forfeit the sum deposited. The language is clear and unambiguous; and, unless we are estopped by subsequent decisions, we must hold the 40*l.* to be a liquidated and ascertained sum to be paid for breach of the agreement, not for a failure to perform some of the minor stipulations for things to be done after the purchaser has taken possession. The declaration shows that the deposit was duly paid into the hands of Hargreaves, and so far the defendant had complied with the terms of the agreement. The plaintiff cannot recover damages beyond that sum.

DENMAN, J. I am of the same opinion. The true meaning of this agreement is, that, if either party fails to perform it, by refusing to assign or to take the premises, the sum to be paid by him as damages for that breach shall be the 40*l.* deposited with Hargreaves, and no more. *Rielly v. Jones* ⁽²⁾ is a very strong case. And there is a later case in this court which is an equally strong authority in favor of the defendant, viz., *Hinton v. Sparkes* ⁽³⁾. There, an agreement for the purchase of a public house, with fixtures, &c., contained the following stipulations: "And, as earnest of this agreement, the purchaser has paid into the hands of the vendor 50*l.*, which is to be allowed in part payment at the completion of this agreement. If the vendor shall not fulfill the same on his part, he shall return the deposit, in addition to the damages hereinafter stated: and, if the purchaser shall fail to perform his part of the agreement, then the deposit money shall become forfeited in part of the following damages: and, if either *of the parties neglect or refuse to comply [77 with any part of this agreement, he shall pay to the other 50*l.*, hereby mutually agreed upon to be the damages ascertained and fixed on breach hereof."

Instead of depositing the 50*l.*, the purchaser gave an I. O. U. for the amount. The purchaser failed to complete the purchase, and the vendor sold the public house for 10*l.* less than the purchaser had agreed to pay for it. In an action by the vendor against the purchaser for breach of the agreement, and upon the I. O. U., it was held that the plaintiff was entitled to recover the 50*l.*,

(1) 6 Bing., 141.

(2) 1 Bing., 302.

(3) Law Rep., 3 C. P., 161.

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and was not limited to the amount of damage he had actually sustained. Bovill, C.J., in giving judgment, after stating the facts, says: "The question turns upon the construction of the contract, and we have to ascertain the intention of the parties from the language they have used. In arriving at a proper conclusion, some assistance is to be derived from the decided cases. So far as the stipulation that 50*l.* shall be the damages ascertained and fixed on breach of the agreement goes, I should have no difficulty in holding, in conformity with the numerous authorities on the subject, that that was in the nature of a penalty, and not of liquidated damages. But there is a further stipulation, that, 'if the purchaser should fail to perform his part of the agreement, then the deposit money shall become forfeited.' In none of the cases referred to do I find a provision like that. The 50*l.* was paid as a deposit, which in a given event was to be forfeited." And Willes, J., distinguishes the case in hand from *Betts v. Burch* ⁽¹⁾ on the same ground. He says ⁽²⁾; "If this agreement had not contained the provision for forfeiture of the deposit on the purchaser's failure to fulfill his part of the contract, we should have been bound to follow the decision of the Court of Exchequer in *Betts v. Burch* ⁽¹⁾. I for one should have done so for the reasons set out in the judgments of Barons Martin and Bramwell, which present as satisfactory and full a view of the cases and of the principles and reasoning applicable to them as is to be found in any book, or indeed in all the books put together; and I will not attempt to add anything to what is to be found there. Here, however, there is an express provision that the deposit money shall become forfeited should the purchaser fail to fulfill his part of the agreement. It 78] is true the agreement *adds 'in part of the following damages,' one of which is the 50*l.* I should presume that the reason for the insertion of those words is to be found in the fact of that part of the document being printed. We must either reject those words, or we must treat them as expressing that the deposit was really paid, and was to go in part satisfaction of the damages, if those damages should exceed the 50*l.* But I feel rather inclined to treat it as a proof that, so far as the purchaser was concerned, the damages were to be a fixed sum. In the event of the purchaser's default, the deposit is to be forfeited, and there is abundant reason for supposing that the parties meant that the damages as against the purchaser should be the sum they have set down. There are many cases to support that view, if it were necessary to refer to them." That case in principle is on all fours with the present, remembering that it is for the court to construe the agreement in accordance

⁽¹⁾ 4 H. & N., 506; 28 L. J. (Ex.), 267. ⁽²⁾ Law Rep., 3 C. P., at p. 166.

with what they conceive to have been the intention of the parties. The result, therefore, of a failure on the part of the vendor to perform the agreement I think should be this, and this only, viz. that he forfeits the 40*l.* which he deposited. The rest is immaterial. As to the plea, I think it as bad as the declaration. The stake holder held the money for the use of the plaintiff. His right to sue for a breach was altogether independent of the action against Hargreaves. There will therefore be judgment for the plaintiff on the demurrer to the plea, and for the defendant on the demurrer to the declaration.

Judgment accordingly.

Attorney for plaintiff: *B. C. Pullan.*

Attorney for defendant: *Fiddey.*

Where the parties to a contract fix a limit to the amount to be paid in case of default no greater sum can be recovered as damages for non performance unless the contract on its face shows a different intention. *Main v. King*, 10 Barb., 29; *Shepard v. Beecher*, McNaghten's Select Cases, 120 marg. p. & note; *Clement v. Cash*, 21 N. Y., 253.

Where, however, it appears on the face of the instrument that the sum named will be an inadequate or an excessive compensation for a breach of some of the conditions or terms of the agreement a greater or lesser sum may be awarded. *Lampman v. Cochran*, 16 N. Y., 275.

But the insertion of a penalty or of liquidated damages will not prevent

the party performing or tendering and offering performance from compelling the party in default specifically to perform or to pay the contract price as for performance. *Sainter v. Ferguson*, 1 MacN., & Gord., 286 (see same case in action at law, 7 C. B., Rep. 716, 62 Eng. C.L.); *Howard v. Hopkins*, 2 Atk., 371; *Hobson v. Trevor*, 2 Peere Williams 191; *Chilliner v. Chilliner*, 2 Ves. Sen., 528; *Sloman v. Walter*, 1 Brown's Chy., 418; *Preble v. Baghurst*, 1 Swanst., 309; *Ingledeu v. Cupp*, 2 Ld. Ray., 814; *Ayres v. Pease*, 12 Wend., 393; *Lampman v. Cochran*, 16 N. Y., 275; *Ward v. Jewett*, 4 Rob., 714, 720; *Robeson v. Whitesides*, 16 Serg. & Rawle, 320; *Robinson v. Bakewell*, 25 Penn., 424.

[Law Reports, 8 Common Pleas, 88.]

Nov. 12, 1872.

***LEBEAU and Another v. THE GENERAL STEAM NAVIGATION [88
COMPANY.**

Ship and Shipping — Carriers — Bill of Lading — Description of Goods — "Weight, Value, and Contents unknown" — Misrepresentation — Estoppel.

The plaintiffs delivered to the defendants, for carriage on board the defendants' ship, a closed case containing silk goods. The bill of lading, as tendered by the plaintiffs for signature, described the contents of the case as linen goods; but before signing it the captain impressed upon it with a stamp the words "weight, value, and contents unknown." The freight charged for silk was higher than that for linen goods, and the freight paid for the goods so delivered was that for linen goods; but the plaintiffs represented the goods to be linen inadvertently and without fraudulent intention. On the ship's arrival at her destination it was found that two pieces of silk had been abstracted from the case.

In an action by the plaintiffs against the defendants as common carriers for non delivery of the silk goods so lost :

Held, that the result of the addition of the words " weight, value, and contents unknown " to the bill of lading was completely to do away with the effect of the description of the goods as linen, and that consequently the defendants' contract was to carry the case and its contents, whatever they might be ; and the plaintiffs were entitled to maintain the action.

Quære whether, even without the additional words, the misrepresentation having been made without fraud could have had the effect of avoiding the contract for carriage of the goods by the defendants as common carriers.

Jessel v. Bath (Law Rep., 2 Ex., 267) followed.

ACTION in the Mayor's Court, London.

Declaration for that, in consideration that the plaintiffs would deliver to the defendants, as carriers of goods for hire, certain goods, to wit, silk broadstuffs, to be by the defendants carried from Boulogne to London, and there delivered according to the direction of the plaintiffs — certain perils, &c., excepted — for freight to be paid by the plaintiffs to the defendants in that behalf, the defendants promised the plaintiffs to carry the said goods from Boulogne to London, and there deliver the same to the directions of the plaintiffs in that behalf, except as aforesaid.

Averments of delivery of the goods to the defendants, and performance of conditions precedent.

Breach, that the defendants only delivered a portion of the said goods to the plaintiffs.

Second count alleged a bailment of goods by the plaintiffs to 89] *the defendants to be taken care of and re-delivered to the plaintiffs on request for reward to the defendants, and non-delivery of such goods. Pleas, denying the promise, the breaches, and to the first count denying the delivery of the goods to the defendants for the purpose and on the terms alleged.

Issues.

The plaintiffs had given particulars of demand, which specified their claim to be in respect of " two pieces of silk broadstuffs delivered to the defendants on board their steamer Cologne, on the 25th day of October, 1871, in a case marked L. C., and numbered 1146, and S. M. 674, for carriage to and warehousing in London." At the trial before the deputy recorder the facts appeared to be as follows: The plaintiffs had delivered the goods in question, consisting of what are called " silk broadstuffs," inclosed in a case, to the defendants, who are carriers of goods between Boulogne and London, for carriage by the defendants from the former place to the latter on board the defendants' steamer Cologne. The bill of lading, as tendered to the captain for signature, described the goods contained in the package as " linen goods ; " but before it was signed by the captain the printed words " weight, value, and contents un-

known" were impressed upon it with a stamp by the captain or the defendants' agent.

Upon the arrival of the vessel at London it was found that the case had been tampered with, and two pieces of silk broadstuff abstracted. It appeared that the freight for silk goods would be higher than that for linen, and that the freight was paid as for linen goods. The jury found, in answer to questions left to them by the learned judge, that the goods in question were safely delivered to the defendants; that they were lost while in their care as carriers; and that the goods were not willfully misdescribed as linen goods that they might be carried at a lower rate, but were inadvertently misdescribed.

The verdict was entered for the plaintiffs for 18*l.* 11*s.* 1*d.*, the value of the goods, with leave to the defendants to move to enter a nonsuit or a verdict for themselves on the ground that there was no evidence of the contract alleged in the declaration, and that the plaintiffs were estopped from proving the delivery of the *goods mentioned in their particulars to the defendants [90 by the bill of lading.

A rule *nisi* had been obtained accordingly, against which

Fild, Q.C., and *Waddy*, showed cause. The contract which is evidenced by the bill of lading, was to carry the package with the particular mark and number thereon. The inaccurate description of the contents does not destroy such contract: *Bates v. Todd* ⁽¹⁾; *McCance v. London and North Western Ry. Co* ⁽²⁾. It is at most merely a representation, and the jury having found that it was not made fraudulently, but by inadvertence, it cannot avoid the contract. There is nothing to show that the misstatement innocently made to the defendants at the time of the shipment at all put them off their guard or altered their position: see the judgment of Blackburn, J., in *Knights v. Wiffen* ⁽³⁾. Moreover, the effect of the representation is entirely done away with by the addition of the words "weight, value, and contents unknown." The captain refuses to receive the goods as being of any particular description, and the effect is that the contract is for carriage of the goods contained in the package without reference to the nature of the contents. The case of *Jessel v. Bath* ⁽⁴⁾ is an authority that such is the true construction of this bill of lading. Martin, B., there says: "The person, therefore, signing this bill of lading, by signing for the amount with this qualification, 'weight, contents, and value unknown,' merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter;" and the rest of the court put the same construction on the docu-

⁽¹⁾ 1 M. & Rob., 106.

⁽²⁾ 8 H. & C., 343; 34 L. J. (Ex.), 89.

4 ENG. REP.]

⁽³⁾ Law Rep. 5 Q. B., 660, at p. 665.

⁽⁴⁾ Law Rep. 2 Ex., 267

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ment. If this be the true effect of the contract, no question of estoppel can arise.

Talfourd Salter and *Finlay* supported the rule. It is submitted that there was no contract on the part of the defendants for the carriage of these silk broadstuffs. The bill of lading is the contract, and that contract is for the carriage of linen stuffs. The memorandum, "weight, value, and contents unknown," makes no difference in this respect. The meaning of that is that the shipowner protects himself from being concluded by [91] the bill of lading, if the goods are *not really such as described; but he does not thereby contract to carry any other goods than linen goods. He merely says "I undertake to carry the goods you described, but you must prove that the contents of the case were what you described, if you seek to make me responsible for such goods in the case of a loss. I am not to be bound to deliver up linen if the contents were brickbats." This construction is quite consistent with the decision in *Jessel v. Bath* ⁽¹⁾.

[BRETT, J. But if he is not bound by the description, can the other side be in the absence of fraud?]

The document must receive a construction that will give effect to all parts of it, if possible. The expression "contents unknown" is not necessarily inconsistent with the description of the goods as "linen goods." If interpreted as meaning that though the goods are linen goods, the nature and quality of such linen goods are unknown, all the expressions in the document will receive a meaning.

Taking it that notwithstanding the memorandum there is a representation of the goods as linen goods, it is contended that if such a representation be untrue, though without fraud, it will avoid the contract for carriage of the goods, or at any rate release the carrier from his liability as a common carrier: 2 Kent's Commentaries 802, s. 604. The question in such cases is not what is the intention of the party making the representation, but what is the effect on the carrier's position. If the effect of the untrue representation is to deceive the carrier as to the value, and to induce him not to bestow on the goods the care and diligence which their value requires, the contract itself becomes a nullity: Story on Bailments, 539, ss. 567-569; Angel on Carriers, 235, ss. 262, 264; Smith's Mercantile Law, 8th ed. p. 279; *Bayson v. Donovan* ⁽²⁾; *Titchburne v. White* ⁽³⁾; *Tyly v. Morrice* ⁽⁴⁾; *Kenrig v. Eggleston* ⁽⁵⁾; *Belfast and Ballymena Ry. Co. v. Keys* ⁽⁶⁾.

⁽¹⁾ Law Rep. 2 Ex., 267.

⁽²⁾ 4 B. & Ald., 21.

⁽³⁾ 1 Str., 145.

⁽⁴⁾ Carth., 485.

⁽⁵⁾ Aleyn, 93.

⁽⁶⁾ 9 H. L., 556.

[DENMAN, J. These authorities seem to refer to cases where the carrier has made inquiries, and the answer is untrue. Here there was no specific inquiring by the carrier.]

*The effect is the same. There is a voluntary statement,[92 the effect of which is to put him off inquiring.

[GROVE, J. The cases seem to have drawn some distinction between voluntary statements, and cases where the carrier has inquired, though I confess I do not see any.]

Moral fraud is not necessary to discharge the carrier. The defendants have never undertaken to act as insurers of any goods but those described by the consignors. The case is like that of *McCunce v. London and North Western Ry. Co.* (¹), where a fact was treated by the parties as the basis of the contract, and it was held that one party could not afterwards dispute the truth of it. The defendants are, therefore mere involuntary bailees of the goods, and there is no question here of any negligence on the part of the defendants beyond the mere fact of non-delivery. If they are not liable as common carriers, they are entitled to succeed on these facts.

[BRETT, J. You would make this like a case of marine insurance, where a concealment of a material fact, though without fraud, is fatal. The law, as to the meaning of such expressions as "weight, value, and contents unknown," is laid down in *Parsons on Shipping*, 197, and the case of *Clark v. Barnwell* (²) is cited, where the bill of lading contained the clause, that the boxes containing the goods were shipped in good order "contents unknown," and the court said "it is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes."]

Secondly. The plaintiffs are estopped from proving delivery of silk goods to the defendants under this bill of lading. The goods were, in consequence of the statement that they were linen, carried, at a less rate of freight; and the defendants, therefore, have acted upon the plaintiffs' representation, and altered their position for the worse, and the plaintiffs cannot now be permitted to deny the truth of the representation. The plaintiffs cannot prove their case without showing the statement to have been untrue.

*[BOVILL, C.J. This question of estoppel comes back [93 really to the same question as that involved in the first point: for if there were a contract to carry the goods, whatever they

(¹) 3 H. & C., 343; 34 L.J. (Ex.), 89.

(²) 12 How., 272.

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were, the nature of the goods delivered becomes immaterial; if there were no contract at all, then it is equally immaterial.]

They also cited *Polhill v. Walter* ⁽¹⁾; *Knights v. Wiffen* ⁽²⁾; *Cahill v. London and North Western Ry. Co.* ⁽³⁾; *Foster v. Cotby* ⁽⁴⁾; *Hollister v. Nowlen* ⁽⁵⁾; *Phillips v. Earle*. ⁽⁶⁾

BOVILL, C.J. In this case the jury have negatived the existence of any fraud or willful misrepresentation. No question is raised by the form of this rule as to the proper amount of the damages, but the application is simply to enter a nonsuit or verdict for the defendants. The contract upon which the plaintiffs in substance declared was that contained in the bill of lading. It appears to me that the effect of that document was, that though the plaintiffs represented that the package in question contained linen goods, the defendants by their agent refused to contract upon the footing that the contents of the case were to be taken absolutely to be of the description that the shippers stated. By the printed memorandum, in my opinion, they repudiated all knowledge of the contents of the case, and all intention of contracting with regard thereto, and contracted to carry the package, whatever its contents might be. That was the view taken in the case of *Jessel v. Bath* ⁽⁷⁾, and that seems to me the correct view of such a contract. It therefore lies on the defendants to get rid of their liability under the contract, and this they seek to do by reason of the statement made by the plaintiffs as to the nature of the goods. But this statement must be taken as having been made innocently and without fraudulent intention. I do not see how such a statement could avoid the contract. If there had been any fraud or willful misstatement with a view to avoiding the payment of a higher rate of freight, the case might have fallen within some of the 94] *authorities cited by the counsel for the defendants, and the contract might have been avoided by the fraud.

But all fraud having been negatived, it is clear that the contract remains, and that such contract has been broken. I can therefore see no ground for entering a verdict for the defendants. Possibly, upon the evidence, there might have been ground for contending that the finding of the jury or the damages should have been different; but no such points have been raised before us. If the company conceive that they are defrauded by untrue statements as to the nature of goods shipped, they may easily protect themselves by so framing their

⁽¹⁾ 8 B. & Ad., 114.

⁽²⁾ Law Rep. 5 Q. B., 660.

⁽³⁾ 10 C. B. (N. S.), 154; 13 C. B. (N. S.), 818; 30 L. J. (C.P.), 289; 31 L. J. C. P., 271.

⁽⁴⁾ 8 H. & N., 705; 28 L. J. (Ex.), 81.

⁽⁵⁾ 19 Wend., 234.

⁽⁶⁾ 8 Pick (Mass.), 182.

⁽⁷⁾ Law Rep. 2 Ex., 267.

bills of lading as to make the truth of the description of the goods a condition of the contract, so as to absolve themselves from liability if the statement be false, whether it be fraudulent or not. In most of the cases of this sort, where it has been sought to relieve the carrier from liability by reason of an untrue statement by the consignor, it has been on the ground that the statement was fraudulent. But apart from fraud if my view of the contract in this case be correct, I can see no ground for an estoppel on either side, for the statement made by one is not accepted by the other. The parties do not agree on the footing that the package contains linen goods only, but that it may contain any other sort of goods. It may be that the plaintiffs might by their statement have been precluded from recovering any greater damages than if the parcel had contained linen. My impression at present — though, the point not having been argued, I pronounce no definite opinion on it — is, that if the point were open such a limitation of the damages might be the result. As the case now comes before us, the defendants cannot succeed without showing that they were altogether absolved from their contract; which, for the reasons I have given, I think they cannot do. On these grounds I think this rule must be discharged.

BRETT, J. In this case the plaintiffs were forwarding agents at Boulogne, and they shipped as shippers certain goods in a closed case on board the defendants' ship, to be carried from Boulogne to London. The shippers presented a bill of lading for signature, in which the contents of the case were described as linen goods. The goods were really what are called silk broadstuffs. The freight *for such goods would have been [95 larger than that for linen, but the freight in fact paid was that for linen. It must be taken that at the time of the shipment and presentment of the bill of lading the plaintiffs did not know that the goods were not linen goods, for the jury have found that the misrepresentation was innocent. On presentment of the bill of lading the captain or shipowner's agent did not sign it as offered, but stamped on the face of it the words "weight, value, and contents unknown," having in fact taken the goods on board without examining the contents of the case. The captain asked no questions of the shippers as to what the contents of the case were. There was no positive evidence of any negligence on the part of the defendants' servants, but simply the fact that at the end of the voyage it was found that though the case was there part of the contents was gone. Under these circumstances the plaintiffs bring an action, not charging the defendants with negligence, but upon their absolute liability as common carriers, to deliver the goods in the same condition as

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they were delivered to them, and describing the goods in the particulars in the action as silk broadstuffs.

The question now is whether there was evidence to go to the jury of any such liability on the part of the defendants with regard to the goods actually shipped, i. e., silk broadstuffs. The application to the court below was to enter a nonsuit, and the court having refused to do so, the present application is to the same effect.

Now, even if the bill of lading had not had indorsed upon it the words "weight, value, and contents unknown," still there would have been a delivery of the goods shipped to the defendants and an acceptance of such goods by them to be carried for reward. What, then, would have been the effect of the statement in the bill of lading that the goods were linen goods? It is not necessary to decide the point, and I do not decide it, but I am inclined to think that that misrepresentation would not avoid the contract. The present question arises between shipper and shipowner, and it does not appear to me that as between shipper and shipowner such a misstatement, though of a material fact, if innocent, can of itself avoid the contract, but that in order to do so it must be willful and fraudulent. I should be inclined to think that the bill of lading, as between 96] shipper and shipowner, would attach as the *contract relating to the goods shipped under it whatever they were.

It is contended, however, that a misrepresentation having been made by the shipper, which would impose a larger liability on the shipowner than if the description in the bill of lading had been correct, that statement must be taken to have been intended by both parties to form, though not part of the contract, the basis of the contract within the doctrine laid down in the case of *McCance v. London and North Western Ry. Co.* (¹), and that, therefore, the plaintiffs are not at liberty to show that silk goods were delivered to the defendants. With reference to this contention it appears to be very material to consider the effect of the stamped memorandum. The bill of lading, as presented by the shipper to the captain, contains an innocent misrepresentation which is that of the shipper, not of the shipowner, that the goods are linen. Did the shipowner act on that misrepresentation? Did he accept it as the basis of the contract? The cases cited in *Parsons on Shipping*, 198, and especially *Clark v. Barnwell* (²), show the meaning of such a memorandum as this stamped on the bill of lading by the captain before he will sign it. When a closed case is offered to him with a representation as to the nature of its contents on the bill of lading he may accept it

(¹) 7 H. & N., 477; 8 H. & C., 343; 31 L. J. (Ex.), 65; 34 L. J. (Ex.), 89.

(²) 12 How., 272.

without alteration of the bill of lading; but if he alters the bill of lading by inserting a statement that the contents are unknown, it is clear, as a matter of business and it seems from the American cases, and *Jessel v. Bath* ⁽¹⁾, to be the law, that he thereby declines to accept the declaration of the shipper; he says in effect, "I accept this case as it appears on the outside; I know nothing about the inside, and will be bound by no statement in reference to it." It appears to me that this completely does away with the statement made by the shipper with respect to the nature of the goods, and both parties must then be taken to agree to the bill of lading in the modified form by which there is no binding statement as to the contents of the package, but the carrier undertakes in his capacity as carrier to carry the case whatever it contains. If so, he must be liable as a carrier upon his contract for non-delivery of the goods, whatever *they were, really contained in the case. Whether he is [97] liable to the value of the goods really contained in the case, or only to the value of such goods as they were represented to be by the shipper is a question not now before us, and one on which I had rather express no opinion, though at the same time I do not wish to be considered as intending to differ from my lord's suggestion that the carrier in such a case may be liable only to the value of the goods as they were represented to be. Here the only question is, whether a nonsuit should have been directed on the ground that there was no contract with regard to the goods in respect of which the action was brought.

It was further contended on behalf of the defendants that the representation of the plaintiffs as to the contents of the package created an estoppel, because the position of the shipowner was thereby altered. It was laid down in the case of *Walker v. Jackson* ⁽²⁾, by Lord Wensleydale, who was certainly a master in the art of laying down general propositions of mercantile law, that as a general rule "if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions, and there is no fraud to give the case a false complexion on the delivery of the parcel, he is bound to carry it as it is," i.e., to carry it as a carrier.

In point of fact no question was here asked by the shipowners on the shipment of the goods. There was only a statement by the shippers on the bill of lading which they, the shipowners, refused to accept. The case, therefore, comes within the rule so laid down in *Walker v. Jackson* ⁽²⁾, and that case shows that the real contract was that the defendants should carry as carriers whatever was in the package.

⁽¹⁾ Law Rep. 2 Ex., 267.

⁽²⁾ 10 M. & W., 161, at p. 169.

1872

Lebeau v. General Steam Navigation Co.

GROVE, J. I must say that I have entertained some doubts in the course of the argument, which are not so entirely removed as I could wish, but they are not strong enough to induce me to differ from the rest of the court. Putting aside at present the printed words afterwards stamped upon the bill of lading, I should have been inclined to hold that where a party entering into a contract for carriage of goods even without fraud 98] describes the goods to be *carried as goods of a certain character, the contract is to carry goods of that character, and not of another character; but then we have to deal with the additional words which were put in to protect the shipowner. The effect of these words without the description given of the goods as linen goods, would be to create a contract on the part of the shipowner to carry the goods whatever they were. My lord is of opinion that the effect of the whole taken together is a refusal to contract on the footing that they were linen goods. I cannot say I am entirely free from doubt as to this construction of the document. I think there was a great deal in Mr. Salter's argument that those words were to be taken as being for the protection of the carrier, and not as repudiating the statement of the person delivering the goods; that the carrier thereby, in effect, says: "I take the goods as you represent them to be, but I am not thereby to be rendered absolutely responsible as if the package contained goods such as described, even if it does not."

But it may be fairly urged in answer to that contention that a construction of the document which would allow the carrier to take such a position is not a reasonable one; that he cannot be allowed to guard himself from all the consequences of the statement on the one hand and claim the benefit of it on the other; to bind the other party by it while he himself refuses to be bound. That appears to be the view taken by the rest of the court, and I am not prepared to dissent from it. I do not think that the case of *Jessel v. Bath* ⁽¹⁾, though no doubt strongly in the plaintiffs' favor, is conclusively so. It seems to me that it might be distinguished on the ground that the words in this case were inserted only for the protection of the shipowner, but as I have said that argument may be met on the ground that such a construction would give an unreasonable advantage to the shipowner. With respect to the question as to the amount of damages to which the shipowner might be liable under the circumstances of the case, as the point is not now before us I desire to express no opinion, though I think that the difficulties arising with reference to the assessment of damages under the circumstances of the present case might afford an argument of 99] considerable weight in favor of *the defendants' contention

(1) Law Rep., 2 Ex., 267.

on the question now before us. On the whole, however, I think, though not without some doubt, that the words indorsed by the shipowner on the bill of lading amount to a repudiation by the shipowner of the statement that the goods were linen goods, and an agreement to carry them whatever they might be.

DENMAN, J. After hearing the able arguments on both sides, I cannot say that I entertain any doubt that this rule should be discharged. I think the true effect of what took place with reference to the bill of lading was to create a contract on the part of the shipowner to carry the package whatever it might contain, and consequently that there was evidence to go to the jury of the contract alleged in the declaration. During the argument, the suggestion was thrown out that the expression "contents unknown" might not go so far as to be inconsistent with the contract being for the carriage of linen goods; but all doubt on that point appears to me to be removed by the passage cited by my Brother Brett from Parsons on Shipping, and the cases there referred to. It seems to me clear that the true meaning goes further than that contended for by the defendant. The case comes, therefore, within the decision in *Jessel v. Bath* ⁽¹⁾, and the general principle laid down in the case of *Jackson v. Walker* ⁽²⁾. With respect to the question of damages, I offer no opinion, as it is not raised in the present case.

, Rule discharged.

Attorneys for plaintiffs : *Learoyd & Learoyd*.

Attorneys for defendants : *Ashley & Tee, for Phillips & Pearce*.

(1) Law Rep., 2 Ex., 267.

(2) 10 M. & W., 161, a. p. 169.

A carrier has a right to assume that a package delivered to him is of no greater value than its external appearance indicated unless the shipper notify him to the contrary. *Warner v. Western*, etc., 5 Rob. 490; but see *Wilkins v. Earle*, 44 N. Y., 172 reversing 3 Rob. 582, where the guest informed the inn keeper ser-

vant a package contained money but not how much. Where the shipper signs and delivers to the carrier a statement of the value of property shipped, in a suit to recover for loss of the property he is estopped thereby. *McCance v London*, etc., 3 Hurl. and Colt., 348.

END OF MICHAELMAS TERM, 1872.

C A S E S
DETERMINED BY THE
COURT OF COMMON PLEAS,
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,
IN AND AFTER
HILARY TERM, XXXVI VICTORIA.

[Law Reports, 8 Common Pleas, 107.]

Jan. 21, 1873.

107] *In the MATTER of an ACTION in the MAYOR'S COURT of LONDON, between JAY COOKE and Others, Plaintiffs, HENRY S. GILL, and Another, Defendants, The UNION BANK OF LONDON, Garnishees.

Lord Mayor's Court — Foreign Attachment — Prohibition — "Cause of Action" — Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii).

The cause of action, that is, the whole substantial cause of action — must arise and the garnishees must reside or carry on business within the city of London, in order to give the Lord Mayor's Court jurisdiction to attach moneys, &c., of the debtor in the hands of a garnishee.

The defendants (who had no residence or place of business in London) drew bills in Philadelphia upon the Union Bank of London, and indorsed them in Philadelphia, and there delivered them to the agents of the plaintiffs, who remitted them to the plaintiffs in London. The drawees refusing to accept the bills, the plaintiffs issued an attachment out of the Lord Mayor's Court to attach moneys of the drawers in the hands of the garnishees, bankers in London:

Held, that the "cause of action" arose in America and not in London, and consequently that the garnishees were entitled to a prohibition.

Addition to the head note of *Mayor of London v. Cox* (Law Rep., 2 H. L., 239), by Willes, J.

DOUGLAS WALKER, on behalf of the garnishees, in Michaelmas Term last, obtained a rule calling upon the plaintiffs to show cause why a writ of prohibition should not issue out of this court, directed to the Mayor's Court of London, to prohibit all further proceedings in that court against the garnishees upon

the foreign attachment issued out of that court in this cause, on the ground that the cause of action did not arise within the jurisdiction: and the rule prayed for costs. The affidavits upon which the rule was obtained were in substance as follows:

1. On the 4th November, 1872, the plaintiffs sued the defendants in the Mayor's Court, London, for an alleged debt of 3012*l.* 10*s.* 4*d.*, and issued process of attachment against the Union Bank of London to attach the moneys of the defendants in *their hands. [The affidavits further averred the is- [108 suing of three other attachments on the 5th, 6th, and 11th of November, 1872, for 4500*l.*, 2500*l.*, and 2100*l.* respectively.]

5. The alleged cause and causes of action, if any, of the plaintiffs against the defendants in the said several actions did not, nor did any or either of them or any part thereof, arise or accrue in the city of London or the liberties thereof, or within the limits of the Mayor's Court, and the same were and are not within the jurisdiction of the said court; but the same all arose in parts beyond the seas, that is to say, in the United States of America, and out of the city of London and liberties and the said limits of the said court; and that no promise to pay had been made or account stated by the defendants within the said city or liberties or the limits of the said court.

6. That, before and at the respective times of bringing the actions and issuing the attachments, and thence hitherto, the defendants were and are citizens of the United States of America, residing and carrying on business at Philadelphia, and having no residence or place of business in the city of London or in the United Kingdom; that the plaintiffs are also citizens of the United States, and carrying on business there; and that their alleged claims against the defendants in the actions arise upon bills of exchange drawn by the defendants at Philadelphia upon the Union Bank of London (who have refused acceptance of the same) and indorsed and delivered by the defendants to the plaintiffs at Philadelphia.

7. That on the 12th of November, 1872, the attorneys for the garnishees wrote to the plaintiffs' attorneys, as follows: "These four attachments are open to the objection we took to the first attachment issued, and since withdrawn by you, viz: want of jurisdiction in the Mayor's Court, both on the ground that the defendants are foreigners, and that the cause of action arose abroad. Our clients feel aggrieved that they should be put to expense and trouble by proceedings being instituted in the Mayor's Court in cases where it clearly has no jurisdiction; more especially after your attention had been called to the point, and you had admitted the force of the objection by withdrawing the first attachment. We are, therefore, again instructed to

109] give you *notice that, unless these attachments are forthwith withdrawn, rules for writs of prohibition will be applied for, and costs will be asked for against the plaintiffs."

Gates showed cause upon affidavits which in substance stated that the plaintiffs carry on business in co-partnership at No. 41 Lombard Street, in the city of London, under the style or firm of "Jay Cooke, McCulloch, & Co.," and do not carry on business together in the United States, as alleged, nor are all the members of the co-partnership citizens of the United States, but two of them are British subjects resident in this country; that the actions were brought by the plaintiffs as indorsees of several bills of exchange against the defendants as drawers and indorsers; that the bills came into the hands of the plaintiffs at their bank in London about the end of October, 1872, and were presented at the Union Bank of London, within the jurisdiction of the Mayor's Court, for acceptance and payment, but the said bank refused to accept or pay the same; that, by the refusal of the bank to accept, a breach of the defendants' contract as drawers and indorsers of the bills had taken place in this country within the jurisdiction of the Mayor's Court, and a cause of action had accrued in respect thereof; and that the first attachment was withdrawn solely on account of a mistake in the names of the parties in the first action.

A material part of the cause of action, viz. the receipt of the bills by the plaintiffs, their presentment to the drawees, and the refusal of acceptance or payment, took place within the city of London. In the notes to *Peacock v. Bell* in 1 Notes to Saund. Rep. at p. 99, n. (3), it is said that, "in actions in inferior courts, it is necessary that every part of that which is the gist and substance of the action should appear to be within their jurisdiction." It is enough, therefore, if the contract is to be performed within the jurisdiction. "Cause of action" does not necessarily mean the *whole* cause of action; but the act on the part of the defendant which gives the plaintiff his cause of complaint — *Jackson v. Spittal* (¹), — in this case, the failure to pay the bills on the default of the drawees. The indorsement 110] was not complete until *the bills reached the hands of the plaintiffs in London: *Chapman v. Cottrell* (²).

[BOVILL, C. J. This being a proceeding in an inferior court, it is necessary to show that every material fact took place within the jurisdiction of the court: 1 Ch. Pl., 7th ed. 287.

KEATING, J. In the copy of the Law Reports in this court, I find in the hand-writing of my late Brother Willes the follow-

(¹) Law Rep., 5 C. P., 542.

(²) 3 H. & C., 865; 84 L. J. (Ex.), 186

ing addition to the head note to *Mayor of London v. Cox* ⁽¹⁾: "The cause of action must arise and the garnishee reside within the city, in order to give the Lord Mayor's Court jurisdiction." We have repeatedly held since that that means substantially the whole cause of action.

BRETT, J. In *Banque de Credit Commercial v. DeGas* ⁽²⁾, bills of exchange were drawn and accepted abroad, and indorsed by the defendant abroad, one of them being payable in London, the others in Liverpool. The plaintiffs, foreign bankers, having no residence or place of business in London, as indorsees of the bills sued the defendant (who likewise had no residence or place of business in London) in the Mayor's Court, and attached moneys of his in the hands of the garnishee, a banker in London; and this court made absolute a rule for a prohibition; holding, upon the authority of *Mayor of London v. Cox* ⁽¹⁾, that the Mayor's Court had no jurisdiction, the cause of action not arising within the city, and the parties to the suit being both resident abroad.]

Formerly the declaration in the Mayor's Court was general; but, in deference to the decision of the house of lords, the modern form contains the words "and within the jurisdiction of this court:" Brandon's Pr. of Mayor's Court, ed. 1871, p. 66. Sect. 15 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), enacts that "no defendant shall be permitted to object to the jurisdiction of the court in or by any proceeding whatsoever except by plea:" and s. 12 enacts that, "where the debt or damage claimed in any action shall not exceed the sum of 50*l.*, no plea to the jurisdiction shall be allowed, provided the defendant or one of the defendants shall dwell or carry on business within the city of London or the liberties thereof at the time of the action *brought, or provided [111] the defendant or one of the defendants shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action, either wholly or in part, arose therein." If, therefore, the defendants themselves had been here, they would have to plead that the cause of action and every part thereof accrued dehors the jurisdiction. It can hardly be that the Mayor's Court has jurisdiction over the defendants and not as against the garnishee. This particular point was not brought before the court or the house of lords in *Cox v. Mayor of London* ⁽³⁾.

[BOVILL, C.J. It may be that the inferior court may require jurisdiction as against a defendant, by his own default. But here there has been no default.]

⁽¹⁾ Law Rep. 2 H. L., 239.

⁽²⁾ 1 H. & C. 338; 32 L. J. (Ex.), 64; 2 H. & C. 401;

⁽³⁾ Law Rep. 6 C. P., 142.

32 L. J. (Ex.), 282; Law Rep., 2 H. L., 239.

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The mere fact that some parts of the cause of action arose out of the city of London does not oust the jurisdiction of the court.

[BRETT, J. Your contention must be that, if there be a breach in the city of a contract made, say in America, the Mayor's Court has jurisdiction.]

The non-payment of these bills by the bank in London upon which they are drawn, is a matter cognizable in the Mayor's Court.

Douglas Walker, in support of the rule. No part of the cause of action in this case arose in London. The bills were drawn and accepted in Philadelphia, and delivered to the plaintiffs' agents in Philadelphia, and they were never accepted.

[BRETT, J. The argument on the other side is that, if any one material fact arises within the city, it is enough to give the Mayor's Court jurisdiction; and that the presentment and refusal to accept were material to charge the drawers and indorsers.]

The contract of the drawer is, not that the drawee shall accept or pay the bill, but that he (the drawer) will pay it if the drawee makes default; and no part of that contract in the present case arose in London. The whole of the opinion of Willes, J., in *Mayor of London v. Cox* ⁽¹⁾ is based upon the assumption that the Mayor's Court is an inferior court.

[BRETT, J. In that case Willes, J., says ⁽²⁾: "In *Reg v. Mayor* 112] of **London* ⁽³⁾, upon a mandamus to admit an attorney to the Mayor's Court, as being an 'inferior court' within the Attorneys' Act; it was, after some hesitation in the Queen's Bench ⁽⁴⁾, fully admitted in the Exchequer Chamber ⁽⁵⁾ by the counsel for the city (the present distinguished recorder) that the court was an inferior court. It was so decided to be by the Court of Queen's Bench, Lord Denman (who had been common sergeant) stating, in delivering the judgment of the court, 'A great many authorities have been cited showing peculiar practice and peculiar jurisdiction in the Mayor's Court, but none showing that it did not come within that class of courts called inferior. Its jurisdiction is limited; the cause of action must be alleged to have accrued within it.'" In the course of the argument of Mr. Gurney in that case, Wightman, J., asks ⁽²⁾, "What constitutes an inferior court?" Getting no reply, he further asks: "In pleadings in the Lord Mayor's Court, are facts averred to have taken place within the jurisdiction?" To this the counsel replies, "It has never been laid down that that conclusively shows a court to be inferior." In proceedings in the Passage Court of Liverpool, before 16 & 17 Vict. c. xxi, it was

⁽¹⁾ Law Rep. 2 H. L., at p. 252.

⁽²⁾ Law Rep. 2 H. L. at p. 256.

⁽³⁾ 13 Q. B., 1.

⁽⁴⁾ 13 Q. B., at p. 17

⁽⁵⁾ 13 Q. B., at p. 40.

necessary to aver that every material fact arose within the jurisdiction.]

At p. 259 of the judgment, the learned judge, commenting upon the case of *Manning v. Farquharson* ⁽¹⁾, observes that s. 15 of the Mayor's Court Act does not affect the garnishee.

BOVILL, C.J. No doubt it had long been the practice down to the passing of the Mayor's Court of London Procedure Act, 1857, to frame the proceedings in the Lord Mayor's Court, whether affidavits of debt, declarations, or other pleadings, without alleging that the facts giving rise to the action occurred within the jurisdiction of the court. The point came under the consideration of this court more than fifty years ago in the case *Bank v. Self* ⁽²⁾, when it was held not to be necessary to aver that the defendant was indebted to the plaintiff within the jurisdiction; the court observing "that the uniform course of pleading had been so ever *since the time of the Year [113 Books, Edw. 4; and it was too much to ask them to overthrow so uniform a practice, without citing so much as a single applicable case in favor of that request." So far, therefore, as the form of the pleadings is concerned, it was not usual or necessary to aver that the cause of action arose within the jurisdiction. From that and from certain expressions to be found in the books, an argument has been raised as to whether or not it was necessary to *prove* that every material fact arose within the jurisdiction. The matter was very much discussed in *De Haber v. The Queen of Portugal* ⁽³⁾, where Lord Campbell delivered an elaborate judgment, in the course of which he says ⁽³⁾: "The circumstance that the cause of action, if there were any, arose out of the jurisdiction of the Lord Mayor's Court, need not be relied on. Nevertheless, after the strong assertions at the bar that this is material, where the defendant does not appear, we think it right to say that, having examined the authorities, we entertain no doubt that the process of foreign attachment can only be duly resorted to where the cause of action arose within the jurisdiction of the court from which it issues." I was counsel in that case, and in several others of the same kind which occurred about that time.

The matter was subsequently considered in *Westoby v. Day* ⁽⁴⁾, where Lord Campbell, delivering the judgment of the court, said: "In the recent case of *De Haber v. The Queen of Portugal* ⁽³⁾, we expressed an opinion that 'the process of foreign attachment can only be resorted to when the cause of action arose within the jurisdiction of the court from which it issues.' But

⁽¹⁾ 80 L. J. (Q.B.), 22.

⁽²⁾ 5 Taunt., 234, n.

⁽³⁾ 17 Q. B., 171; 20 L. J. (Q.B.), 488,

⁽⁴⁾ 17 Q. B., at p. 213.

⁽⁵⁾ 2 E. & B., 605, at p. 620; 22 L. J., (Q.B.), 418.

we said, 'The garnishee is safe by paying under the judgment of the court;' adding, 'The objection that the cause of action did not arise within the jurisdiction of the court, *if properly taken*, must prevail.' That judgment is explained by Montague Smith, J., in *Matthey v. Wiseman* ⁽¹⁾. Here, the objection is properly taken, viz. by a rule for a prohibition, and by the garnishee. The Lord Mayor's Court is clearly a court of inferior jurisdiction, and is subject to the general rules applicable to courts of that description, except in so far as it is exempted therefrom by usage or by statute.

[14] *In Chitty on Pleading, 7th ed. 287, the rule is thus laid down: "In inferior courts, it continues necessary, in addition to the statement of a county as a venue, to aver that every material fact took place 'within the jurisdiction of the court,' as, in assumpsit, as well that the promise or contract was made as that the goods were sold or the money had and received, &c., within the jurisdiction of the court; and, if the allegation be omitted, the declaration will be insufficient even after verdict." And numerous decisions as to what are facts material to be so averred are to be found in Comyns's Digest, Courts (p. 9). The same rule, in substance, is laid down in the notes to *Peacock v. Bell*, in 1 Notes to Saund. Rep. at p. 99, n. ⁽²⁾, where many authorities are referred to. And, although a general form of affidavit and declaration were formerly allowed, yet, when it came to the evidence, it was always necessary to prove that the gist and substance of the cause of action occurred within the jurisdiction. Here, all the material facts which constitute the cause of action occurred beyond the jurisdiction of the Mayor's Court. Independently, therefore, of the recent act, that court had no jurisdiction over this contract or the parties thereto. Does, then, the 20 & 21 Vict. c. clvii. affect the garnishee? Sect. 15 enacts that "no defendant shall be permitted to object to the jurisdiction of the court in or by any proceeding whatsoever except by plea." That section is in terms confined to the defendant.

But a writ of prohibition may be applied for by the garnishee, or even by a stranger. That is settled by *DeHaber v. The Queen of Portugal* ⁽¹⁾ and *Mayor of London v. Cox* ⁽²⁾. Then 2 s. 12 enacts that "where the debt or damage claimed in any action shall not exceed the sum of 50*l.*, no plea to the jurisdiction shall be allowed, provided the defendant or one of the defendants shall dwell or carry on business within the city of London or the liberties thereof at the time of the action brought, or provided the defendant or one of the defendants shall have

⁽¹⁾ 18 C. B. (N.S.), 657, at p. 678; 34 L. J. (C.P.), 216.

⁽²⁾ 17 Q. B., 171; 20 L. J. (Q.B.), 488.

^(*) Law Rep., 2 H. L., 288.

dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action, either wholly or in part, arose therein." That is a still further limitation of the action of the defendant to challenge the jurisdiction. The effect of the statute is merely to prevent the *defendant from objecting to the jurisdiction otherwise [115] than by plea. There is nothing in it to interfere with the right of the garnishee or a stranger to come to this court for a prohibition. As against them the process of attachment can only go where every material fact which constitutes the cause of action arose within the jurisdiction of the Mayor's Court. I think the rule for a prohibition must be made absolute; and, as the plaintiffs have thought fit to make the experiment, it will be absolute with costs.

KEATING, J. I am entirely of the same opinion. The way in which Mr. Gates put the case was this, that, because the statute precludes the defendant from disputing the jurisdiction of the Mayor's Court except by plea, the court ought to be governed by the same rule in granting a prohibition. Before the passing of the act, it is clear,—and for that no authority need be cited,—that whatever the course of pleading was, every material fact constituting the cause of action must have been proved to have occurred within the jurisdiction of the Mayor's Court, as in the case of every other court of inferior jurisdiction. The real question is whether that has been altered by the Act of Parliament. Sect. 12 is a somewhat extraordinary one. It applies only to cases under 50*l.*, and is binding only in its terms. In terms it is confined to the defendant, and does not apply to the garnishee. The object is to compel the defendant to appear. This is an application by the garnishees; and we are bound to decide upon it as if the act had not passed. That is established by *Mayor of London v. Cox*.⁽¹⁾ It was certainly the opinion of Willes, J., whose able judgment in that case, which was prepared with great care, distinctly and decidedly lays it down that the two sections referred to do not extend to a garnishee or to a stranger who comes for a prohibition. In that opinion I entirely concur. I think the prohibition should go.

BRETT, J. In this case the claim of the plaintiffs in the Mayor's Court was for a much larger sum than 50*l.* To maintain that claim,—the action being brought against the defendants as the drawers and indorsers of several bills of exchange, it would be necessary to prove that the defendants drew and

(1) Law. Rep. 2 H. L., 289.

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116] indorsed the bills, *that they presented to the drawees for acceptance, that acceptance was refused, and that the defendants had notice of such refusal. The bills were drawn in America. Probably the indorsement and delivery also took place in America. They were to be presented for acceptance in London. I take it, therefore, that some material facts arose in America, and some in London. The question is, whether under such circumstances the plaintiffs are entitled to attach moneys of the defendants in the hands of the garnishees.

According to the addition made by Willes, J., to the head-note to *Mayor of London v. Cox* ⁽¹⁾, it seems to have been the opinion of that very learned judge that the cause of action must arise and the garnishee reside within the city, in order to give the Lord Mayor's Court jurisdiction. What is the meaning of that? Beyond question the Mayor's Court is a court of inferior jurisdiction. In the judgment in that case Willes, J., points out that it had been so decided in *Reg. v. Mayor of London* ⁽²⁾ and *De Haber v. The Queen of Portugal* ⁽³⁾, and that it is subject to all the rules with regard to inferior courts. That being so, independently of the act, every material fact must have arisen within the jurisdiction to entitle the Mayor's Court to entertain the suit. "Cause of action" has been held from the earliest time to mean every fact which is material to be proven to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse. If that be the general rule, has the act of parliament made any difference in this respect? Now, the first thing to be observed with reference to the case of *Mayor of London v. Cox* ⁽⁴⁾ is, that the objection may be taken before any pleading at all. The decision was that, though by the act, as between the plaintiff and the defendant, if the defendant appears, he can only plead in a particular way; yet, where a prohibition is moved for in a superior court either by the garnishee or a stranger, it may be moved for before plea, and the application is to be determined by the ordinary principles of the common law. It follows, therefore, that the courts will grant a prohibition unless the cause of action is shown to have arisen within the jurisdiction of the Mayor's Court.

That principle was endeavored to be stated by Montague 117] Smith, J., and myself in the *case of *Banque de Cr dit Commercial v. De Gas*. ⁽⁵⁾ Montague Smith, J., there says: "The Lord Mayor's Court, as a local court, has no jurisdiction in matters which do not arise within the city of London. That is the general principle upon which the decision of the house

⁽¹⁾ Law Rep. 2 H. L., 239.

⁽²⁾ 13 Q. B., 1.

⁽³⁾ 17 Q. B. 171; 20 L. J. (Q.B.), 488.

⁽⁴⁾ Law Rep., 6 C. P., 142.

of lords in *Mayor of London v. Cox* ⁽¹⁾ is founded; and it embraces every description of action, including actions on bills of exchange ⁽²⁾. In the present case, it appears that neither the plaintiffs nor the defendant reside in London; and, further, that the cause of action did not arise wholly within the city of London. The case, therefore, is clearly governed by *Mayor of London v. Cox* ⁽¹⁾. It would be idle, after the full discussion the question of jurisdiction of the Mayor's Court underwent in that case before the highest tribunal of the country, for this court to entertain the matter again." In the course of the argument in that case, I am reported to have said ⁽³⁾: "To entitle the plaintiff to an attachment, two things must concur, viz: that the cause of action, that is, the whole cause of action, arose within the city, and that the person in whose hands the money or the goods are attached, the garnishee, as he is called, resides within the city." I substantially said the same in giving my judgment: and I still adhere to the opinion I then expressed. I believe that to be the meaning of Willes, J., in the MS. note referred to; and I have heard him say so very many times since. I think that is the right rule. Therefore, where the question does not arise between the plaintiff and a defendant who has appeared, but between the plaintiff and the garnishee, or between the plaintiff and a stranger, the jurisdiction to issue an attachment does not exist unless every fact material to establish a cause of action accrued within the city.

Rule absolute ⁽⁴⁾.

Attorneys for plaintiffs: *Janson, Cobb, & Pearson.*

Attorneys for garnishees: *Lyne & Holman.*

⁽¹⁾ Law Rep., 2 H. L., 239.

upon bills of exchange were excepted out of the general rule.

⁽²⁾ It had been contended that actions

⁽³⁾ Law Rep., 6 C. P., at p. 143.

[Law Reports, 8 Common Pleas, 122].

Jan. 30. 1878.

*BURSLEM V. ATTENBOROUGH.

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Pledge of Goods—Pawnbrokers Act (39 & 40 Geo. 3, c. 99), ss. 15, 16—Loss of Pawn Ticket—Right to Redeem.

The 16th section of the 39 & 40 Geo. 3, c. 99, provided that in case the pawn ticket for goods pledged were lost, mislaid, destroyed, or fraudulently obtained from the owner thereof, and the goods remained unredeemed, the pawnbroker should, at the request of the person claiming to be the owner of the goods, deliver to such person a copy of the ticket and a form of affidavit (now a declaration) stating the circumstances, and the person having obtained such copy and

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form of affidavit should thereupon prove his property in such goods to the satisfaction of a justice of the peace, and should verify on oath or affirmation before the said justice the truth of the particular circumstances attending the case mentioned in the said affidavit, "whereupon" the pawnbroker should suffer the person so proving such property to the satisfaction of such justice as aforesaid, and making such affidavit or affirmation as aforesaid, on leaving the copy of the ticket and the affidavit with the pawnbroker, to redeem such goods and chattels :

Held, that where a person having lost the ticket for goods pledged by him had, in accordance with the section, procured from the pawnbroker a copy of the original ticket and a form of declaration, proceeded with the same before the magistrate, and having proved his title before him, straightway returned to the pawnbroker, and showed him the declaration which he had made, he was not bound to redeem the goods immediately, but might redeem them at any time at which he might have redeemed them if he still held the original ticket, and that the pawnbroker was not justified in the meanwhile in delivering the goods to a person producing the original ticket.

DECLARATION : trover for three rings.

Pleas 1, not guilty; 2, not guilty by statute; 3, not possessed; 4, leave and licence.

Issues.

At the trial before Grove, J., at the sittings in Middlesex during Trinity Term, the facts, so far as now material, appeared to be as follows :

The plaintiff had pledged three rings with the defendant, a pawnbroker, and duly received tickets for them. Plaintiff had had some transactions with one Braithwaite, in consequence of which the latter had incurred pecuniary liability to him, and it was arranged between them that the plaintiff should hand over to Braithwaite the tickets for some articles, other than the rings in question, which the plaintiff had pledged, that Braithwaite might pay the interest due on such pledges, which pay-
[23] *ments were to go in discharge of Braithwaite's liability to the plaintiff. When handing over the tickets in pursuance of this arrangement the plaintiff, by mistake, gave to Braithwaite the tickets for the three rings which were in the same bundle with the others. Braithwaite subsequently absconded. Some time after, in the month of October, missing the tickets, the plaintiff went to the defendant, the pawnbroker, and on stating the circumstances received from him the copies of the tickets and the statutory declarations required under such circumstances by 39 & 40 Geo., 3, c. 99 s. 16. He then went before a magistrate, as required by that section, and made the declarations. He afterwards, during October, came and showed the declarations to the pawnbroker, but retained them in his own possession, not redeeming the rings or renewing the pledge upon them. In February, 1861, the original tickets were produced to the defendant's assistant by a person who claimed to be the owner thereof, and required delivery of the rings, which were accordingly delivered to him. The plaintiff afterwards came to the

pawnbroker and producing the declarations, claimed to redeem the rings. On these facts the verdict was entered for the plaintiff for 88*l.*, the value of the rings, leave being reserved for the defendant to move to enter a nonsuit on the ground that the plaintiff was not entitled to recover upon the true construction of the 15th and 16th sections of 39 & 40 Geo. 3, c. 99. A rule nisi had been accordingly obtained, against which

B. Francis Williams, and *Reid*, showed cause. There was clearly a losing or mislaying of the tickets in this case within the meaning of the 16th sect. of 39 & 40 Geo. 3, c. 99. The plaintiff gave them to Braithwaite by mistake, and when he discovered the mistake he was unable to find Braithwaite. After discovering the loss he gives notice to the pawnbroker that he is the true owner, and proves his title in the manner pointed out by the section.

Upon so doing, by the terms of the act he is to be regarded as the true owner, and the pawnbroker is not entitled to give the goods up to the producer of the original ticket. The plaintiff came back and showed the defendant the declarations which he had made in conformity with the 16th section. He was not obliged to leave them with the pawnbroker then, for [124 they are his documents of title, nor was he obliged to redeem the goods immediately.]

Giffard, Q.C., and *Francis Turner*, supported the rule. The mode in which these tickets got into Braithwaite's hands was not a loss or mislaying within the 16th section of the Pawnbrokers Act. The plaintiff himself parted with the tickets. He gave Braithwaite a bundle of tickets, not knowing, no doubt, that these tickets were among them; but it did not appear that Braithwaite would not assume that he was intended to have them for the same purpose as the others. There is nothing but a misunderstanding between them as to what tickets were to be included in the arrangement between them, which arose from the plaintiff's own default.

[*BOVILL*, C.J. But if the plaintiff cannot, on discovering the mistake, find Braithwaite to get the tickets back, why is there not a loss within the act?]

Secondly, the plaintiff was entitled to redeem the pledge immediately upon making the declaration required by the 16th section and leaving it with the pawnbroker; but he cannot hold the declaration over, and leave the pawnbroker without any protection in the meanwhile against the original ticket. The declaration is to be the pawnbroker's protection. The words of the section are: "Whereupon the pawnbroker shall suffer the person or persons making such affidavit as aforesaid, on leaving

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the said affidavit with the said pawnbroker, to redeem such goods and chattels."

The word "whereupon" imports that the goods must be redeemed immediately.

[GROVE, J. Does it not only mean "the preceding requirements of the section having been complied with" ?]

According to that construction of the section, the pawnbroker might be placed in a situation of the greatest difficulty. He has no means of knowing whether the person coming and procuring the copy of the ticket and the form of declaration has ever proceeded before the magistrate and made the declaration. Is it reasonable that the pawner should come down upon him six months after, and produce the declaration, and claim to redeem the goods? What is he to do if in the meantime the original ticket is produced? The proper course, if the pawner wishes [25] the goods still to *remain in pawn, is to repledge and have a fresh ticket, leaving the declaration with the pawnbroker. The word "thereupon," in the same section, has been made the subject of judicial interpretation in *Vaughan v. Watt* (1). That case is a strong authority in favor of the construction the defendant seeks to put on the word "whereupon."

BOVILL, C.J. The provisions in the Pawnbrokers Act to which our attention has been called are provisions for the benefit of the pawnbroker, and for his protection from difficulties arising out of conflicting claims. By the 15th section the pawn ticket is given a character analogous to that of a negotiable instrument, and the pawnbroker is required to deliver the goods pledged to the party presenting it, and is indemnified in so doing unless the case is brought within the terms of the 16th section. The words are "unless the real owner or owners thereof proceeds or proceed in manner hereinafter provided and directed for the redeeming of goods and chattels pledged where such note hath been lost, mislaid, destroyed, or fraudulently obtained from the owner or owners thereof." It does not appear to me that this amounts to saying, "unless the real owner actually redeems in pursuance of section 16," but, "unless he takes the steps pointed out by section 16 in order to entitle him to redeem."

If this were not so, it appears to me that the effect would be to diminish the protection intended to be given to the pawnbroker, or else to impose hardship upon the pawner, who would be deprived of his right to redeem the goods at any time within the year. The 16th section provides that in case the ticket be lost, mislaid, destroyed, or fraudulently obtained from the owner

(1) 6 M. & W., 492.

or owners thereof, and the goods remain unredeemed, the pawnbroker shall, at the request of the person claiming to be the owner of the goods, deliver to such person a copy of the ticket and a form of affidavit stating the circumstances. And the person having obtained such copy and form of affidavit "shall thereupon prove his property in such goods and chattels to the satisfaction of some justice of the peace, &c., and shall verify on oath or affirmation before the said justice the truth of the particular circumstances *attending the case mentioned in [126 the affidavit; the caption of such oath or affirmation to be authenticated by the handwriting thereto of the justice," &c.

It was argued that in the present case there was no losing or mislaying within the terms of the section. It seems to me that the case is clearly one within the section. That being so, the plaintiff did apply to the defendant, in pursuance of the section, for copies of the tickets and forms of declaration, which were delivered to him, and he then proceeded before the magistrate, and having complied with the other requirements of the section, he subsequently returned and showed the pawnbroker the declarations he had made. It may well be that these proceedings must be taken and brought to the pawnbroker's notice at once, for otherwise the pawnbroker would probably be entitled to presume that they had not been taken. After providing for the protection of the pawnbroker that the magistrate shall authenticate the affidavit by his signature, the section then proceeds: "Whereupon the pawnbroker shall suffer the person or persons proving such property to the satisfaction of such justice as aforesaid, and making such affidavit or affirmation as aforesaid, on leaving such copy of the said note or memorandum and the said affidavit with the said pawnbroker, to redeem such goods and chattels." It appears to me that the word "whereupon" must be construed as meaning upon compliance with the requirements of the section, and cannot be construed as suggested on behalf of the defendant. By the other provisions of the act, the person pledging is to have a year within which to redeem the pledge. Nothing in the 16th section appears to me to indicate any intention of abridging this period. I do not see any necessity for so doing; the pawnbroker has proof, authenticated by the signature of the magistrate, that the particular person is the owner of the goods, and when such proof has been given to him he can only deliver the goods to the person making the declaration, and is protected by the statute in so doing. Any difficulty arising from the word "whereupon" in the 16th section is now removed by the 35 & 36 Vict. c. 93, which has made fresh provision for these cases; but it appears to me that the plaintiff having complied with the provision of the 16th section

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[127] by immediately going before the magistrate and *making the necessary declarations, and having immediately communicated the fact that he had done so to the pawnbroker, the latter was not justified in delivering up the rings to another person, and this action is maintainable. The rule must therefore be discharged.

KEATING, J. I am of the same opinion, though I think there certainly is some ambiguity in the section. It seems to me, in the first place, clear that there was a loss or mislaying of the ticket within the meaning of the act. In case of such loss the person entitled to the goods is to go to the pawnbroker and procure a copy of the ticket and a form of declaration, and thereupon to go before the magistrate and make the declaration. I am prepared to hold that he must do this promptly. Such was held to be the effect of the word "thereupon" in the case of *Vaughan v. Watt* (¹), which was referred to in the course of the argument.

Then it was argued by Mr. Giffard that the section would be defective according to the construction sought to be put upon it by the plaintiff, inasmuch as the pawnbroker might be left in ignorance whether the necessary steps had been taken. The act of last session appears to have removed that difficulty, but even under the old act if the party obtaining the form of declaration did not communicate with the pawnbroker and left him in ignorance whether he had made the declaration or not, I should be prepared to hold that he had not fulfilled the requirements of the act. The legislature could not have intended to place the pawnbroker in the difficulty of not knowing what had been done with respect to the declaration and yet being liable to be affected by it. This point does not arise in the present case. Everything has been done by the plaintiff to bring him within the terms of the section. He went promptly to the magistrate, and immediately returned to the pawnbroker and showed him the declarations. After that the pawnbroker was not, in my opinion, justified in parting with the rings to another person.

GROVE, J. I also think the rule should be discharged. I am clearly of opinion that the tickets in this case were lost or mis-
[128] laid *within the meaning of the section. Then, with respect to the second point, the question is whether a party, who has obtained the copy ticket and declaration provided for by the section from the pawnbroker, and has immediately proceeded before the magistrate and having made the declaration before him returned to the pawnbroker and shown it to him authenti

(¹) 6 M. & W., 492.

cated by the magistrate's signature, must redeem the goods immediately, and is prevented from leaving them any longer in pawn. There does not appear to be any provision to that effect in the statute. The loss of the pawn-ticket might occur within a week from the time when the articles were pawned; can it be contended that the meaning is, that a person who is obviously short of money from the fact of his pawning the goods at all, must find the money to redeem immediately or leave the goods at the mercy of the pawnbroker? What might have been the case if the plaintiff had not returned to the pawnbroker at all after procuring the declaration, and had left him in ignorance of the steps he had taken, it is not now necessary to decide.

HONYMAN, J. I have arrived at the same conclusion as the rest of the court, though not without some little doubt. The pawnbroker would obviously be placed in a position of great difficulty if after the pawner had obtained the declaration from him and gone before the magistrate he were to be left in ignorance of what had been done and the pawner might nevertheless come and claim to redeem at any time. It is true that no such difficulty arises in the present case, but I am not clear that it might not in other cases upon the construction of the section adopted by the court.

Rule discharged.

Attorney for plaintiff: *Ashwin.*

Attorney for defendant: *Neate.*

[Law Reports, 8 Commo : 138, 181.]

February 7, 1873.

[IN THE EXCHEQUER CHAMBER.]

***HORNE and ANOTHER v. MIDLAND RAILWAY COMPANY.¹ [131**

Measure of Damages for Breach of Contract—Common Carrier—Notice of Special Circumstances.

The plaintiffs, being shoe manufacturers at Kettering, were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4s. per pair, an unusually high price. The shoes were to be delivered by the 3d of February, 1871, and the plaintiffs accordingly sent them to the defendants' station at Kettering for carriage to London in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station master (which for the purposes of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3d, and that unless they were so delivered they would be thrown on their hands; but he was not informed that there was anything exceptional in the character of the

(¹) Affirming 3 Eng. Rep., 390.

contract. The shoes were not delivered in London till the 4th of February, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2s. 9d. a pair, which in consequence of the cessation of the French war, was, apart from the previously mentioned contract, the best price that could have been obtained for them, even if they had been delivered on the evening of the 3d of February, instead of the morning of the 4th.

In an action against the defendants for the delay in delivering the shoes, they paid into court a sufficient sum to cover any ordinary loss occasioned thereby, but the plaintiffs further claimed the sum of 267l. 3s. 9d., the difference between the price at which they had contracted to sell the shoes and the price which they ultimately fetched:

Held (per Kelly, C.B., Blackburn, J., Mellor, J., Martin, B., and Cleasby, B. Lush, J., and Pigott, B., dissenting), that the plaintiffs were not entitled to recover the latter sum, the damage not being such as might reasonably be considered as arising naturally from the defendants' breach of contract, or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract:

Per Kelly, C.B., Blackburn, J., and Mellor, J., and Cleasby, B., the notice given to the defendants was not such that they could reasonably be supposed to have had in their contemplation, at the time of entering into the contract for the carriage of the shoes, damages of such an exceptional nature as those claimed:

Per Martin, B., and, *semble*, per Blackburn, J., and Lush, J., a mere notice as such could not have the effect of rendering the defendants liable to more than ordinary damages; but it must in order to do so be given under such circumstances as to make it a term of contract, that the defendants will be liable for such damages if the contract be broken:

Per Lush, J., and Pigott, B., the notice given to the defendants was sufficient to put them upon inquiry as to the nature of the contract which the plaintiffs were under, and if they chose to accept the goods for carriage without further inquiry, they took the risk of what the contract might turn out to be, and were liable to the plaintiffs for the loss actually occasioned.

Hadley v. Baxendale (9 Ex. 341; 23 L. J. (Ex.), 179), discussed.

Error from the judgment of the Court of Common Pleas upon a special case reported, Law Rep. 7 C. P., 583.

[32] **Field*, Q.C. (*Lumley Smith* with him), for the plaintiffs. *Prima facie* the measure of damages is the amount of damage actually sustained. This rule is subject to the limitation that if the damages are exceptional, and such as the parties cannot be reasonably supposed to have contemplated when they entered into the contract, they cannot be recovered. In the present case the defendants must be taken to have contemplated the possibility of these damages occurring. Notice was given to their servant that the plaintiffs had a contract, and also that it was a profitable one, or else the shoes would not be likely to be thrown on their hands. This was sufficient to put the person receiving the goods on inquiry as to what the nature of the contract was; and no such inquiry having been made, the defendants must be looked upon as having taken the risk of what it might turn out to be, and cannot now say that they did not contemplate the damages. In *France v. Gaudet* (¹), in a case of trover it was held that the plaintiff could recover the amount of the price at which he had resold the champagne, which was converted.

(¹) Law Rep. 6 Q.B., 199.

[MELLOR, J. That case was peculiar. Champagne of a similar quality was said not to be procurable in the market. There was therefore, no other test of the value of the goods.]

The value of the goods is the value that they have to the individual, and that is what he is entitled to recover: *Wilson v. The Lancashire and Yorkshire Ry. Co* ⁽¹⁾. The case falls within the principles laid down in *Riley v. Horne* ⁽²⁾. If the carrier does not choose to inquire as to the value of the goods, he takes the chance of what they may turn out to be. So here the goods had a certain value to the plaintiff by reason of the contract he had; the defendants are told that there is such a contract, and they do not choose to inquire what it is.

[BLACKBURN, J. It is clear that the plaintiff gave notice that it was important that the goods should be delivered on the 3d, but he gave no notice of the extraordinary nature of the contract. There is a substantial consideration involved; if the carrier has notice of an extraordinary risk he may perhaps charge a higher rate of carriage to cover it. The real meaning of the limitation as to damages is that the defendant shall not be bound to pay more *than he received a reasonable con- 133 sideration for undertaking the risk of at the time of making the contract.]

Surely it cannot be necessary for a man to go with his contract in his hand, or to say, "I have contracted at such a price." It is sufficient if notice is given that the case is of an exceptional nature. Substantially, this notice amounted to an intimation that an important contract, of a highly beneficial character, was at stake.

[MARTIN, B. Must not there be what amounts to a contract to be responsible for the exceptional damages?]

In the case of *Hadley v. Baxendale* ⁽³⁾ it is stated that, "if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants, and thus known to both parties, the damages resulting from such breach of contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." It is not put as depending on a contract.

[BLACKBURN, J. In *Hadley v. Baxendale* ⁽³⁾ there was really no affirmative decision that a mere notice as such would be sufficient, because it was held that there was not a sufficient notice in that case. I know of no affirmative decision based on the dictum so thrown out in *Hadley v. Baxendale* ⁽³⁾.

⁽¹⁾ 9 C.B. (N.S.), 632; 30 L. J. (C.P.), 232. ⁽²⁾ 5 Bing. 217, at p. 222.

⁽³⁾ 9 Ex. 341; 23 L. J. (Ex.), 179.

The notice here given may be treated as evidence of a contract. [He also cited *Gee v. Lancashire and Yorkshire Ry. Co* (1).]

H. James, Q.C., (*Sturge* with him). The inference to be drawn from the case is, that the market value of the goods on the day when they were brought to the defendants' station was the same as when they were ultimately sold. There is nothing to show any diminution in value during that period. Admitting that the contract of the company was a contract to carry and deliver by the 3d of February and was broken, the question is, what are the damages. The damages are those for which the defendants have contracted to be responsible; and *prima facie* the contract is to be responsible for any diminution in the ordinary market value of the goods between the day on which they ought to have been delivered and the day on which they actually were [34] *delivered, and no such diminution is shown here. If it be sought to impose a further liability on the defendants, it is necessary to prove knowledge of the special facts imparted to them under such circumstances, as that a term was engrafted into the contract that they should be liable for the special damage; see per Willes, J., in *British Columbia Saw Mill Co. v. Nettleship* (2). Then, was any such term engrafted into the contract here? All the defendants were told was, that there was a contract; nothing was said as to the exceptional nature of that contract, and the unnaturally high price at which the shoes were sold arising out of the peculiar circumstances of the case. The value of the shoes must be considered for the purpose of estimating the damages as the value contemplated by both parties, not that which is known to the one only, and not communicated by him to the other. The burden of inquiry is not thrown on the carrier in such a case; it is for the party who seeks to fix him with the consequences of knowledge to communicate the circumstances to him. If mere notice is not sufficient as such, then there is no evidence here of a contract to be liable for the special damage. The mere receipt of the goods by the carrier after such a notice as was given here does not amount to such a contract. The company, as common carriers, are bound to carry the goods. Assume, for the purpose of argument, that the carrier would not be bound to carry if the consignor insisted on his undertaking an exceptional liability, or might be entitled to insist on an increased rate in consideration of his contracting to bear such liability; still, in order to raise an inference that the carrier has contracted to bear such liability the consignor must have acquainted him with the nature of it.

[LUSH, J. If your argument be correct the doctrine sug-

(1) 6 H. & N., 311; 30 L. J. (Ex.), 11.

(2) Law Rep. 3 C. P., 508.

gested in *Hadley v. Baxendale* ⁽¹⁾ as to the effect of notice is wrong.

MARTIN, B. If a contracting party on receiving notice of the extraordinary liability sought to be cast on him refused to undertake it, clearly he would not be liable. Does not this show that the right to exceptional damages depends on contract and not on mere notice?]

Assuming that notice might be sufficient, then the notice here was insufficient to bring the case within the doctrine in *Hadley v. Baxendale*. ⁽¹⁾ [He also cited *Cory v. Thames Ironworks Co.* ⁽²⁾; *Smeed v. Ford* ⁽³⁾; *Great Western Ry. Co. v. Redmayne*. ⁽⁴⁾]

[*Field*, Q.C., reply, cited *Peninsular, &c., Co. v. Shand* ⁽⁵⁾; *Great Northern Ry. Co. v. Behrens*. ⁽⁶⁾]

KELLY, C.B. I am of opinion that the judgment of the court below must be affirmed. The rules by which this case must be determined are the creatures of authority, and we have not so much to consider in determining it what might be just or unjust, reasonable or unreasonable, under the circumstances of the case, in the absence of previous decisions, as to consider the cases that have been decided on the subject and deduce from them the general principles that must govern our judgment. It must, in the first place, be noticed that this is the case of a railway company, though it does not seem to have occurred to the court below, or to the counsel in arguing the case there, that there was any material difference between the case of a railway company and that of any ordinary person who had contracted for the delivery of goods. It therefore becomes incumbent upon us to consider what is the nature of the ordinary contract between the consignor of goods and the carrier, and what is the obligation imposed upon a railway company in respect of the carriage of goods of an ordinary character such as those in the present case.

It is necessary, however, in the first place, to deal with certain facts that were made the subject of discussion during the argument. Questions were raised with respect to the market price of the shoes at the time of the making the contract for the sale of them, at the time of their delivery to the company, and at the time when they ought to have been delivered to the consignees. I see, however, nothing whatever stated in this case to show that the market price of the shoes at any time which it will be material for us to consider was more than the sum for

⁽¹⁾ 9 Ex., 341; 23 L. J. (Ex.), 179.

⁽²⁾ Law Rep., 3 Q. B., 181.

⁽³⁾ 1 E. & E., 602; 28 L. J. (Q.B.), 178.

⁽⁴⁾ Law Rep., 1 C. P., 329.

⁽⁵⁾ 3 Moo. P. C. (N.S.), at p. 293.

⁽⁶⁾ 7. H. & N., 950; 31 L. J. (Ex.), 299.

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which they ultimately sold, viz., 2s. 9d. a pair. We are not even told when the contract for the supply of the shoes was entered into, it is only stated in the case that the plaintiffs were [36] in January and February, *1871, under contract to deliver a quantity of shoes. Then, with regard to the other periods referred to, there are no materials whatever laid before us from which we can gather what the market price was other than the fact that on the day when they were disposed of they sold for 2s. 9d. a pair. It seems to me, therefore, that we must assume that the only market price put before us, viz.: 2s. 9d. a pair, was the market price at the other periods in question. That being so, the plaintiffs deliver the shoes to the defendants to be conveyed by them to London, and there delivered on the 3d of February, and they intimate to the defendants' servant that it is important that the shoes should be delivered on the 3d, inasmuch as they are under contract to deliver them, and they will be thrown on their hands if not delivered. It is contended by the defendants that, under these circumstances, the plaintiffs can only recover damages calculated according to the ordinary value of the goods. A question of very great importance has been raised in the course of the argument, to which it is proper to refer, though, for reasons I shall presently state, I do not think it will ultimately become necessary to decide it—that is to say, the question what the position of a railway company is when goods are entrusted to it for carriage with an intimation of the consequences of non delivery, such as it was argued on behalf of the plaintiffs existed in the present case. The goods with which we have to deal are not the subject of any express statutory enactment; the case with respect to them depends on the common law taken in connection with the acts relating to the defendants' railway company. Now, it is clear, in the first place, that a railway company is bound, in general, to accept goods such as these, and to carry them as directed to the place of delivery, and there deliver them. But now suppose that an intimation is made to the railway company, such, as Mr. Field contended, this amounted to, not merely that if the goods are not delivered by a certain date they will be thrown on the consignor's hands, but in express terms stating that they have entered into such and such a contract and will lose so many pounds if they cannot fulfill it, what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. If, then, they are bound to receive, and do so without more, what is the effect *of the notice? Can it be to impose upon them a liability to damages of any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for

the proposition that the notice without more could have any such effect. It does not appear to me that the railway company has any power, such as was suggested, to decline to receive the goods after such a notice, unless an extraordinary rate of carriage be paid. Of course they may enter into a contract, if they will, to pay any amount of damages for non-performance of their contract in consideration of an increased rate of carriage, if the consignors be willing to pay it; but in the absence of any such contract expressly entered into, there being no power on the part of the company to refuse to accept the goods, or to compel payment of an extraordinary rate of carriage by the consignor, it does not appear to me any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned.

For these reasons, even if the notice given in the present case could be taken as having the effect contended for by Mr. Field, I do not think, in the absence of any expressed or implied contract by the company to be liable to these damages, that there could be any such liability imposed upon them. But however this may be, and even assuming that there might be such a notice as would render the company liable to the exceptional damages claimed by the plaintiffs, I am clearly of opinion that the intimation given to the company in this case does not amount to such a notice. It certainly gave the defendants notice of what might probably be assumed to be the case without express notice, viz., that the plaintiffs being under contract to deliver the shoes, would have them thrown on their hands if not delivered in due time, but it gave the defendants no notice of the exceptional nature of the contract and the unusual loss that would result from a breach of it. That being so, the case comes within the principle clearly to be deduced from all the authorities (not excepting the case of *Hadley v. Baxendale* (¹) itself, whatever view may be taken of the dictum in that case with respect to the effect of notice) viz., that the damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally, i.e., according to the usual [138 course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. The effect of the notice here is, that the company must be taken to have contemplated that the plaintiffs were under a contract to deliver the shoes, and would be liable to lose the benefit of such contract, or to an action for breach of it, if they failed to deliver under it. The loss

(¹) 9 Ex. 341; 23 L. J. (Ex.), 179.

they would in the usual course of things sustain or the damages they would have to pay on such a contract would depend upon the rise or fall of the market price. We are not told when the contract for the sale of the shoes was made, nor what was the market price at that time. It appears to me, therefore, that the only damage we can consider is the difference between the market price at the time when the goods ought to have been delivered and the market price at the time when they were delivered. There is no evidence before us to show that the market value of the shoes at the time when they were delivered to the defendants or at the time when they ought to have been delivered to the consignees, differed from their value at the time when they were ultimately sold. So far as appears from the case, it seems to me that it must be taken that the market price was the same at all those periods. Under those circumstances, in the absence of any notice to the defendants of the exceptional nature of the contract into which the plaintiffs had entered, I think the plaintiffs are only entitled to nominal damages, unless, perhaps, in respect of expenses, if any, that were incurred, which would be amply covered by the amount paid into court. It appears to me that very serious consequences might result from making a railway company liable upon a mere notice that the consignor is under contract to deliver, such as that in the present case, for an indefinite amount of damages arising out of a contract of a highly exceptional nature, entered into under very special circumstances.

MARTIN, B. After feeling considerable doubt in the course of the argument, I have at length arrived at the same conclusion as the lord chief baron. The case is, no doubt, one of some hardship to the plaintiffs, for they have unquestionably lost a large sum in consequence of the non-performance by the [139] defendants of their contract. But upon the best consideration I have been able to give to the case, and looking to what is on the whole the best general rule to lay down in such cases, I am of opinion that the plaintiffs are not entitled to recover the extraordinary damages which they claim.

It appears to me that one mode of testing the amount of the defendants' liability would be this: Suppose the goods, instead of merely being delayed in delivery, had been burnt while in defendants' custody. Would the plaintiffs have been entitled to recover for them at the rate of 4s. a pair, or only their value at the time when they were burnt? It strikes me that they could only recover their value when burnt, and not their value calculated according to the price at which they were sold some time before, when the market was high. The case of *France*

v. *Gaudet* ⁽¹⁾, which was cited in argument, was between vendor and purchaser, and, it appears to me, involved, different considerations. I think these questions of damages must necessarily be considered very much upon the particular circumstances of each individual case. With regard to the present case another test may be suggested. If some other person had delivered a similar quantity of shoes to the defendants for carriage on the same day as the plaintiffs, not being under contract to deliver them, it is admitted he could only recover 20%. How can it be, in the absence of an express contract to that effect, that by reason of a mere communication to the defendants that the goods would be thrown on the plaintiffs' hands if not delivered in time, so widely different a liability can arise upon contracts for which the amount of the consideration was the same, and in all other respects precisely similar? There is also another consideration which arises with respect to the case of a carrier, such as this is, showing the great importance of, as far as possible, keeping to a uniform rule with regard to damages in such cases. If such a notice as this were to be held sufficient to impose this exceptional liability on carriers, they would be laid open to imposition without end. There would be constant attempts to set up against them special circumstances, of which they would be alleged to have had notice, to enhance the damages. It seems to me that it would be very dangerous to impose any liability on a carrier to damages *beyond the ordinary and natural consequences of his [140 breach of duty, in the absence of something equivalent to a contract on his part to be liable to such damages.

BLACKBURN, J. I am also of opinion that the judgment should be affirmed. Various questions have arisen in the course of the case as to which it is not necessary to come to any absolute decision; and I do not wish, sitting in a court of error, in any opinion I may express upon such questions to be taken to have given any absolute decision upon them. No doubt, *prima facie* the damages which actually result from a breach of contract are recoverable, provided that they are such as may fairly and reasonably be considered as arising directly and naturally, that is to say, in the ordinary course of things, from such breach of contract. The amount of them may be unexpectedly large, but still the defendants must pay. If a man contracts to carry a chattel and loses it, he must pay the value, though he may discover that it was more valuable than he had supposed. But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of

(1) Law Rep., 6 Q. B., 199.

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an exceptional nature, arising from special and peculiar circumstances it is clear that in the absence of any notice to the defendant of any such circumstances such damages cannot be recovered. It is said that there was a notice in the present case. Here arises, with relation to the doctrine of notice, one of those questions to which I have adverted, and on which in what I may now say I do not wish to be considered as expressing a final opinion. It is clear that if the notice be such, and given under such circumstances, as to amount to evidence of an actual contract to bear the exceptional loss arising from the breach of contract, then such contract, if found to exist, would be binding; but here, as it seem to me, it is quite clear that there was no such special contract. The plaintiffs delivered the goods to the superintendent at the railway station to be carried by the railway in time to be delivered by the company on the 3d of February, and gave him notice of the fact that if they did not arrive by that date loss would be occasioned to them. The company would be bound to deliver in a reasonable time, and this notice [41] would amount to a notice to the company that the *reasonable time within which they would then be expected to deliver, under the circumstances of the case, was by the 3d of February; but I cannot see how it would alter the ordinary contract of the company into a contract to deliver by the 3d of February, or to pay 1s. 3d. damages per pair for the shoes. I doubt whether it would have been within the authority of the station master to make any such contract. Then if there was no special contract, what was the effect of the notice? In the case of *Hadley v. Baxendale* ⁽¹⁾ it was intimated that, apart from all question of a special contract with regard to amount of damages, if there were a special notice of the circumstances the plaintiff might recover the exceptional damages. This doctrine has been adverted to in several subsequent decisions with more or less assent, but they appear to have all been cases in which it was held that the doctrine did not apply because there was no special notice. It does not appear that there has been any case in which it has been affirmatively held that in consequence of such a notice the plaintiff could recover exceptional damages. The counsel for the plaintiffs could not refer to any such case, and I know of none. If it were necessary to decide the point, I should be much disposed to agree with what my Brother Martin has suggested, viz., that in order that the notice may have any effect, it must be given under such circumstances, as that an actual contract arises on the part of the defendant to bear the exceptional loss. Before, however, deciding the point, I should have wished to take time to consider; but it is not ne-

(1) 9 Ex., 341; 23 L. J. (Ex.), 179.

cessary to do so, for even assuming that the law is the contrary of that which I incline to think it to be, to my mind it is clear that there was no such notice in the present case as to raise the question. There was, no doubt, a full intimation to the defendants that the time by which the goods were delivered was of consequence, that the reasonable time which the company had to deliver in must not be protracted beyond the 3d of February, and I think it may fairly be said that there was an intimation to the defendants that the contract under which the plaintiffs had to deliver was a profitable one; but I cannot see, giving the notice its widest construction, that it amounted to a notice that the plaintiffs would suffer such an exceptional loss as *they did by non-delivery of the shoes. So that I think [142 it is not necessary to decide whether the dictum in *Hadley v. Baxendale* (1) is well founded, though I do not wish to disguise my present impressions on the subject.

MELLOR, J. I am of the same opinion. The contract entered into with the railway company by the plaintiffs was, as it appears to me, of the ordinary character, and there was a notice given that the goods were to be delivered by the 3d of February, or they would be thrown on the consignors' hands. It does not seem to me that this notice, giving it its utmost effect, brings the case within the dictum in *Hadley v. Baxendale* (1). It was a notice, no doubt, that it was important that the goods should be delivered by the 3d of February, but it was no notice of the exceptional circumstances of the case, and the exceptional price which was to be given for the shoes. There was, it is true, a notice that the consignor was under contract to deliver the shoes, but nothing was told to the carrier as to the special nature of the contract. Under these circumstances it appears to me all that we can look to in estimating the damages is the market price when the shoes were delivered to the carrier, and the time when the contract was broken. What we are told as to that is, that in consequence of the cessation of the war between France and Prussia, Hickson & Sons, except for the circumstance that they had the contract in question with the French house, could not have sold the goods at any better price than that actually obtained if they had received them on the evening of the 3d of February instead of the morning of the 4th. Under these circumstances, it seems to me, we must infer that the market value was the same on the 3d as on the 4th, and so no special damages are recoverable. The sum of 20*l.*, therefore, which was paid into court was amply sufficient.

PICOTT, B. I regret to be obliged to differ from the opinions expressed by my lord chief baron and my Brothers Martin,

(1) 9 Ex., 341; 23 L. J. (Ex.), 179.

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Blackburn, and Mellor. I think the plaintiffs are entitled to recover the damages which they claim. The question which we have to decide is, upon what principle damages are to be [143] assessed for *breach of a contract to carry and deliver entered into by a railway company with a special notice to them of the consequences of breach of contract on their part. I agree that if the company are to be liable for extraordinary damages by reason of the notice given to them, it must be because they are at liberty to decline to carry the goods at an extraordinary risk, unless it be that they have a right to charge an extraordinary rate of carriage in consideration of incurring such risk. The company cannot, I should suppose, as carriers, go beyond the highest rate permitted by their acts of parliament in any case, and probably that rate would not be an adequate remuneration to cover the increased risk. The alternative is, that they may decline to carry goods which are not tendered to them for carriage upon the ordinary liability of common carriers, unless the consignors will enter into a special contract in relation to such goods. It follows, to my mind, that if they do not refuse the goods or make any special stipulations with regard to them, but accept the goods with notice of what the consequences will be if they are not delivered by a certain time without objection, there is evidence from which we may infer that they have contracted on the special terms that they will be liable for those consequences. The whole case, therefore, seems to me to resolve itself into the question, what was the contract between these parties? The notice given by the plaintiffs is to the effect that they are under contract to deliver the goods on the 3d of February, and that if they do not deliver by that time the goods will be thrown on their hands. It seems to me this notice imports that the contract under which the plaintiffs were bound to deliver was a valuable contract to them, by performance of which they would reap profits, and by breach of which they would sustain loss. The defendants receive the goods under this notice, and they do break their contract, and the plaintiffs, as a consequence of such breach, incur loss to the extent of 1s. 3d. per pair upon the shoes. Such loss being actually the result of the defendants' breach of contract, why are the plaintiffs not to recover it? It can only be by reason of some artificial rule established by the decisions, or some ground of public policy, that makes the measure of the damages which may be recovered less than that which is actually sustained. I agree that the true rule is that which has been laid down, viz., that [144] the damages must be *such as naturally, i.e. in the ordinary course of things, flow from the breach, or such as may reasonably be supposed to have been in the contemplation of

the parties. Why are not the damages in this case of the latter character? It does not seem to me to be shown that there was anything exceptional in the nature of the contract entered into for sale of the shoes. There was nothing exceptional in the price that I can see. The price was not greater than would have been given at the time the contract was made to any other person than the plaintiffs. It was the ordinary price which would have been paid at that time by reason of the circumstance that shoes were then in great demand in consequence of the French war. When the time came for delivery the price had fallen to 2s. 9d., because the war was about to cease and the demand was smaller. What is there more in this than that the market had fluctuated and fallen between the time when the contract was made and the time for delivery? It is said that the defendants would not contemplate so large a loss from the notice that they received. If this notice be not sufficient it must be necessary in such a case to communicate the exact details of the contract. I cannot think this is so. If the carrier is told that the consignor is under contract to deliver by a certain day, or else he will lose the benefit of the contract, and accepts the goods without further inquiry, does he not take the risk of what the loss on the contract may turn out to be? The consignor has put him on his guard, and if he omits to inquire further, he has only himself to blame. I agree with my Brother Martin, that these cases as to damages must necessarily often stand very much on their individual circumstances, but it seems to me that the present case is within the doctrine laid down in *Hadley v. Baxendale* (1) and the cases that have followed it, and that these damages are such as may reasonably be considered as having been within the contemplation of the parties at the time they made the contract as the probable result of a breach of it. I therefore think the judgment of the court below should be reversed.

LUSH, J. I also think the judgment of the court below should be reversed. I agree that the liability of the carrier under ordinary circumstances is to pay such damages as [145 are the natural and ordinary consequences of the breach of his contract, or such as may be reasonably supposed to have been in the contemplation of the parties. I think that the duty of the carrier is co-extensive with such liability. He is not at liberty to refuse to carry on the ordinary terms, but if it is sought to impose upon him a liability of an extraordinary nature arising out of peculiar circumstances, then I think he is entitled to decline to carry, unless he be paid a higher rate of carriage.

(1) 9 Ex., 341; 23 L.J. (Ex.), 179.

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Though there is no decision to that effect, the conclusion seems to me plainly deducible from the judgment in *Riley v. Horne* ⁽¹⁾, which was a considered judgment of the Court of Common Pleas delivered by Best, C.J. The law is thus laid down at p. 220 of the report: "As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of destination as for the labor and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious and his journey is more expensive in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a stronger and more vigilant guard is required than when he carries articles not easily removed and which offer less temptation to dishonesty."

• It appears to me plainly to follow from this exposition of the law that if it is sought to fix a carrier with any extraordinary liability he may decline to carry-unless a higher rate of remuneration be paid to him. It seems to have been accepted as the law from the case of *Hadley v. Baxendale* ⁽²⁾ downwards, that where notice is given to the carrier of the special circumstances, and he consents nevertheless to carry the goods without objection, he may be liable for the extraordinary damages arising out of such circumstances. I agree, however, with the suggestion that the notice in such cases can have no effect except so far as it leads to the inference that a term has been imported into the contract making the defendant liable for the extraordinary damages. As Willes, J., says in *British Columbia Saw [146] Mill Co. v. Nettleship* ⁽³⁾, "the *knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." I think if the person delivering the shoes had said to the station master that he was under contract to deliver the shoes by the 3d of February, and would gain so much if he performed his contract and lose so much if he did not, and the station master had without objection consented to receive the shoes, the company would have been liable. No question is now raised as to the authority of the station master, and it must therefore be taken that for this purpose he represents the company. I have no doubt that what did pass on the delivery of the goods was equivalent to a distinct acceptance

(1) 5 Bing., 217.

(2) 9 Ex., 341; 23 L. J. (Ex.), 179

(3) Law Rep., 3 C. P., 499, at p. 509.

of the shoes by the company to be carried on the terms that the company were to be liable for the consequent loss to the plaintiffs if the shoes were not delivered.

To my mind the statement made to the station master must have conveyed to his mind the impression that the plaintiffs were under a profitable contract to deliver the shoes by the 3d of February and would lose the benefit of such contract if the shoes were not so delivered. It was not specified how much the plaintiffs would lose, but I do not think that was necessary. The rule seems to apply which was laid down by Best, C.J., in *Riley v. Horne* (¹), to the effect that if the carrier choose to make no inquiry as to the nature of the goods he is responsible to the full value in case of loss, and cannot afterwards complain that he was not informed of such value. It seems to me by analogy that the intimation here given to the station master was sufficient to throw upon him the duty of inquiring what the consequences would be if the shoes were not delivered, and if he did not do so, but received the goods without objection, the company is in the same position as if the whole details of the contract were communicated to them.

CLEASBY, B. I agree with the conclusion arrived at by the lord chief baron and those members of the court who concurred with him. I offer no opinion on the question how far a notice might be sufficient to fix the defendants with exceptional damages considered merely as a notice, and not as amounting to evidence of a contract to be liable for such damages, [147 though I do not wish to be understood as differing from the opinion expressed by Willes, J., in the *British Columbia Saw Mills Co. v. Nettleship* (²) on that point; nor do I express any opinion on the question how far a railway company may be placed in a different position from any other person in such a case as the present. The safest course in this case appears to me to be to affirm the decision of the court below on the ground on which it was given, if that ground was sufficient. I rest my judgment on the ground that, even if a mere notice could be sufficient, the notice here is not of such a nature as to affect the defendants with knowledge of the exceptional terms of the plaintiff's contract for the supply of the shoes. The case states that the plaintiffs were under contract for sale of the shoes, but it does not say when such contract was made; but as it is stated to have been subsisting in January, it was probably made some time before. It appears that if the shoes were not delivered by the 3d of February the purchasers were entitled to refuse to accept them, so that the last day for delivering under the contract

(¹) 5 Bing., 217.

(²) Law Rep., 3 C. P., at p. 509.

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must have been the 3d of February; but it does not appear that they might not have been delivered before. So that it comes to this: that the plaintiffs are really seeking to make the defendants responsible for loss which was in great measure caused by their driving off delivery to the last day on which it could be made under the contract. I must say I think the materials on which they seek to do so are wholly insufficient. No intimation was given to the defendants as to the peculiar nature of the contract or the exceptional price at which the shoes were sold, so as to give them any opportunity of contracting with reference to the precise liability which they were to incur. The only way in which the case can be put on behalf of the plaintiffs is the way in which it was put by my Brother Lush, namely, that enough was said to put the defendants on inquiry as to the details of the contract, and that by not inquiring they dispensed with any further notice as to its terms. I cannot agree in that view of the case. I should hesitate to regard the station-master as a person entrusted with a discretion as to making such inquiries, though I do not base my judgment on that ground. I [48] do not think enough was told to the station master *to put him on inquiry. There was nothing to indicate to him the probability of the contract being of so exceptional a character, and the consequences of breaking it so unusually large.

Judgment affirmed,

Attorneys for plaintiffs: *Sawbridge & Wrentmore.*

Attorneys for defendants: *Beale, Marigold, & Beale.*

[Law Reports, 8 Common Pleas, 148.]

[IN THE EXCHEQUER CHAMBER.]

Feb. 10, 1873.

BAYLEY v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.*

Master and Servant—Railway Company, Responsibility of, for Act of Servant—Scope of Employment.

The plaintiff, a passenger on the defendant's line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage, just after the train had started, by one of the defendants' porters, who acted under an erroneous impression that the plaintiff was not in the right train for the place to which he had booked. The defendants' rules, a copy of which was given to each porter in their employ, assigned various specific duties to the porters, among others, that of not suffering passengers to get in or out of trains in motion, and concluded with a general direction that they were to do all in their power to promote the

*Affirming 3 Eng. Rep., 308.

comfort of the passengers and the interests of the company. It was proved to be the duty of the porters to prevent passengers going by wrong trains, as far as they could do so, but it was not their duty to remove passengers from the wrong train or carriage:

Held, affirming the decision of the court below, that there was evidence on which the jury might find that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendants' servant, and one for which they were therefore responsible.

This was an appeal by the defendants against the judgment of the Common Pleas discharging a rule to enter a nonsuit.

The report of the case in the court below is to be found in Law Rep. 7 C.P., 415, where the pleadings are given. The facts as stated in the case on appeal, were in substance as follows: (1)

1. This cause came on for trial at the Cheshire Spring Assizes, *1872, before Baron Channell. The action was [149 brought by the plaintiff to recover compensation from the defendants for bodily injuries sustained by him under the following circumstances:

2. The plaintiff, on the 26th of July, 1871, took a ticket by the defendants' railway from a station called Guide Bridge, on the defendants' line, to Stockport, by a train which left Guide Bridge between half-past six and seven o'clock on the evening of that day, intending to get thence to Macclesfield.

3. The plaintiff, after taking a third-class ticket by the defendants' line as before mentioned, proceeded to enter and take his seat in a third class carriage forming part of the train. Upon his doing so one of the porters in the employ of the defendants asked him where he was going to, to which he replied, "to Woodley, and thence to Stockport and Macclesfield." The porter rejoined, "You are in the wrong train, you must come out," and immediately, and just as the train was moving off, violently pulled the plaintiff out and threw him down on the platform. The plaintiff, by the fall under the circumstances above mentioned, sustained the bodily injuries in respect of which this action was brought. The plaintiff was in fact in the proper train, and in that by which he intended to travel.

It was proved that it was part of the duties of the porters to prevent passengers going by wrong trains, as far as they were able to do so.

4. The rules and bye laws of the company were put in evidence on behalf of the defendants, and it was further proved that the porters and servants of the company, including the porter whose conduct caused the injury to the plaintiff, were supplied with copies thereof.

(1) It has been thought expedient to set out the facts as found in the case on appeal, inasmuch as the case took a slightly different course from that which it took in the court below, involving the necessity for a somewhat fuller account of the facts than was necessary in the report of the case below.

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5. Among the rules and bye laws were the following :

"Rule 71.— Clerks in charge, station masters, guards, police, and porters are on no account to suffer passengers to get into or out of the carriages while the trains are in motion, in contravention of the bye-laws; and the names and addresses of any persons persisting in so offending are to be immediately reported to the superintendent of the line.

"Rule 92.— Porters are to act under the orders of the clerks in charge, station masters, station inspectors, and foremen. They are to do the work and attend to whatever business they may have assigned to them, exerting themselves for the good order, regularity, and cleanliness of the trains and stations where they are placed, and do all in their power to promote the comfort of the passengers and the interests of the company.

150] *"Rule 101.— If the clerk in charge or guard has reason to suppose that any passenger is without a ticket, or is not in the proper carriage, he must request the person to show him his ticket, have any irregularity corrected, and the excess fare paid if any is due; and should any passenger wish to change his place from an inferior to a superior carriage, the guard must see the excess fare paid at the station where the change is made.

"Rule 105.— The doors of the carriages on the off side are always to be locked, and guards must see that passengers keep their seats in case of any stoppage on the road, except when necessary to alight, and exert themselves to prevent passengers getting in or out of the train while in motion.

"Rule 107.— Smoking in the carriages and at the stations must not be allowed; and in the event of any passenger being disorderly or misconducting himself, the guard must endeavor to stop the nuisance, but in case he cannot succeed by gentle means, he must take such a course as may be considered necessary, and either place the offender in a compartment alone or leave him at the next station, according to circumstances, in all cases obtaining and reporting his name and address, if possible, to the superintendent of the line.

"Bye law 4.— Smoking is strictly prohibited, both in the carriages and in the company's stations or premises. Every person smoking in a carriage, or in any station, or upon any of the company's premises, is hereby subjected to a penalty not exceeding 40s.; and any person persisting in smoking in a carriage or station, or upon the company's premises, after being warned to desist, shall, in addition to incurring a penalty not exceeding 40s., be immediately, or, if travelling, at the first opportunity, removed from the company's premises.

"Bye law 5. Any person found in the company's carriages or stations, or on the company's premises, in a state of intoxica-

tion, or committing a nuisance, or otherwise willfully interfering with the comfort of other passengers, is hereby subjected for every such offence to a penalty not exceeding 40s., and shall immediately, or, if travelling, at the first opportunity, be removed from the company's premises.

"Bye law 8.—Any person who shall enter or leave, or shall attempt to enter or leave, any of the carriages while the train is in motion, or at any other place than the regular passenger platform or other place appointed by the company for passengers to enter or leave the carriages, shall for every such offence forfeit or pay any sum not exceeding 40s.

6. It is the duty of the porters of the company, if passengers are in a wrong train or carriage, to inform them of the fact, and request them to alight before the train starts, and in default of their so doing to report them to the guard, with the view of their being charged any excess fare which may be due under the circumstances, but not to remove them from the train or carriage.

7 It was objected on behalf of the defendants that the porter had no authority from the company, expressed or implied, to drag the plaintiff out of the carriage under the circumstances above stated. That it was, in fact, in contravention of the rules, and not *within the scope of his employment, but a willful [151 and illegal act of his own, done on his own responsibility, for which the company were not liable. The learned judge gave the defendants leave to move to enter a nonsuit or a verdict on these grounds. The jury found a verdict for the plaintiffs with 200*l.* damages.

Hughes (Field, Q.C., with him), for the defendants, the appellants. The general principle that governs these cases appears to be that where the servant is acting within the scope of his employment, and has a discretion entrusted to him, then, however improperly he may exercise such discretion, the master is responsible. Here no discretion was intrusted to the servant. It is found that it was not the duty of the porters to remove persons who might be in the wrong carriage. There was also a bye law distinctly forbidding persons from getting out of the carriages when in motion, and the porters are expressly ordered to exert themselves in preventing breaches of such bye law. How then can it be said that the porter was acting within the scope of his employment in violently dragging the plaintiff out of the carriage when the train was already in motion?

[KELLY, C.B. There is a direction expressly given to him to prevent persons if possible from travelling in the wrong carriage. Was he not acting in what he might think to be the performance of that duty in removing the plaintiff?]

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It is expressly stated in the case that it was not the duty of the porters to remove a passenger from the wrong carriage.

[BLACKBURN, J. The question is, whether there was any evidence for the jury of an authority to the porters to remove a person from the wrong carriage. In one sense, no doubt, it might not be their duty. If I tell my coachman he must not get drunk and flog the horses immoderately, no doubt it is not his duty to get drunk and flog the horses immoderately, but if he does so in the course of his employment, shall I not be responsible?]

It must be admitted that no directions as to the mode of executing the authority can exonerate the master; but it is contended that here there is no question as to the mode of executing the authority. It cannot be said to be within the scope of the authority to do acts which are expressly forbidden by the company's instructions. If the porter had been entitled to remove a passenger from the carriage under the circumstances which he conceived to exist, then for any blundering or undue violence in so doing on his part the defendants would clearly be responsible. But under no circumstances was it his duty to remove the passenger, even when the train was stationary, much less when the train had started.

[PIGOTT, B. Is not the question here, whether he was acting within the scope of his employment? He might be doing an act which was, in one sense, not his duty, and yet as it appears to me, be acting within the scope of his employment. A general duty was cast upon him to prevent passengers from riding in the wrong carriages. What he erred in was the mode in which he performed such duty.]

M'Kenzie v. M'Leod (1) is a similar case to the present, and the defendant was held not to be liable.

[BLACKBURN, J. In that case the servant burnt the house down in trying to cleanse the chimney; but it was distinctly shown that it was not her duty in any case to cleanse the chimney, but only to light the fire, and therefore, that she was not acting in the course of her employment. The present case would be analogous if there were no authority to prevent persons from travelling in wrong carriages.]

He also cited *Roe v. Birkenhead Ry. Co.* (2); *Poulton v. South Western Ry. Co.* (3); *Edwards v. North Western Ry. Co.* (4); *Limpus v. London General Omnibus Co.* (5); *Seymour v. Greenwood* (6); *Moore v. Metropolitan Ry. Co.* (7); *Eastern Counties Ry. Co. v. Browne* (8).

(1) 10 Bing., 385.

(2) 7 Ex., 36.

(3) Law Rep., 2 Q. B., 534.

(4) Law Rep., 5 C. P., 445.

(5) 1 H. & C., 526; 32 L. J. (Ex.), 34.

(6) 6 H. & N., 359; 7 H. & N., 355; 30 L. J. (Ex.), 189, 327.

(7) Law Rep., 8 Q. B., 36.

(8) 6 Ex., 314; 30 L. J. (Ex.), 196.

McIntyre, Q.C. (*Ignatius Williams* with him), for the plaintiff, was not called upon.

KELLY, C.B. The principle to be deduced from the authorities on this subject is, that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the acts done may *be the very reverse of that which the servant [153] was actually directed to do. Here it is unquestionably found that it was the duty of the porters to prevent persons from travelling in the wrong carriages as far as they were able to do so. The porter in this case sees the plaintiff in what he conceives to be the wrong carriage. Does he not act in what he may well suppose to be the performance of his duty when, having no other means of preventing the plaintiff from travelling in such carriage, he pulls him out? In the present case no doubt the porter acted blunderingly, and the results were unfortunate to the company, but one can well imagine a case in which the porter might rightly conceive it to be for the interests of the company and his imperative duty at any risk to remove a person from a carriage, even if force were necessary. A carriage might be so dangerously overcrowded as to expose the company to the risk of incurring serious responsibility as the consequence of such overcrowding. Various other grounds may be suggested in which it might be the porter's duty to remove a person from a carriage. The present case is distinguishable from the cases of isolated acts unconnected with other circumstances done by a servant in direct disobedience to the orders of a master. Here among many precepts and directions to the porters we find it distinctly provided that they are, as far as they are able, to prevent persons from travelling in the wrong carriage. We do find it no doubt also stated that it was not the duty of the porters to remove a person from the wrong carriage; but where orders are given to some extent inconsistent, and such that it may not always be easy under all circumstances to comply literally with the provisions of all of them — for instance, where, as in the present case, there is a general order to prevent persons from travelling in the wrong carriage if possible, accompanied by a direction not to remove them from the carriage — it is obviously very likely that the servant may, while acting in the performance of the general duty cast upon him, neglect the particular direction as to the mode of doing it. But it appears to me that he will be none the less acting within the scope of his employment. Again, the rules expressly provided that the porters shall do all in their power to promote the interests of the company, and if a porter, intending to act in the perform-

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ance of the duty so cast upon him and doing something with a
154] *view to the interests of the company, happens to disobey another direction really to some extent inconsistent with the general orders given to him, it is very difficult to say that in so doing he is not acting within the scope of his employment. On the whole, I think the porter here was so acting; he was interfering in a case in which it was obviously his duty to interfere, and to act to the best of his ability for the protection of the interests of the company; under these circumstances, if in so doing he acted wrongfully or negligently, I think the company must be liable. For these reasons it appears to me that the judgment of the court below should be affirmed.

MARTIN, B. I am of the same opinion. I am disposed to think that we must be governed in deciding this case by the general principles of the law of master and servant, and that it is really quite immaterial what the rules and bye-laws of the company were. The question appears to me to be principally one of fact, and if in fact the porter thought that this man was in the wrong carriage, and, acting as the servant of the company, pulled him out of a carriage of the company where he thought he had no right to be, the company are responsible for his wrongful act in so doing.

BLACKBURN, J. I also think that the judgment of the court below should be affirmed. The law is clear that where a servant, acting within the scope of his employment, does an act negligently, or with excessive violence, the master is responsible for the consequences. In the case of *Seymour v. Greenwood* (*) there was very great excess of violence used by the servant, and yet the master was held responsible because the servant was acting within the scope of the employment, however outrageous and improper the manner in which he did it might be. The question here, therefore, is whether there was evidence that the porter, in what he did, was acting within the scope of his employment. If he were so acting, then, however much he may have abused his authority, however improperly and blunderingly he may have acted, the defendants are liable. It seems to me that the judgment of the court below puts the case upon
155] its fair footing. It is *stated, in the third paragraph of the case, that it was the duty of the porters, as far as possible, to prevent persons from going in the wrong carriages. Even without the statement it would be tolerably obvious that such is their duty. It is, likewise, expressly provided by the rules that the porters are to promote the comfort of passengers and the interests of the company. In this particular case the porter,

(*) 6 H. & N., 359; 7 H. & N., 355; 30 L. J. (Ex.), 189, 327.

in a stupid, blundering manner, did what, certainly, in the result, did not promote the comfort of the passengers nor the interests of the company; but he was given authority, as far as he could, to prevent passengers from travelling in the wrong carriage, and general directions to promote the interests of the company to the utmost of his power, and if, thinking that the plaintiff was really in the wrong carriage, and that he could get him out without hurting him before the train had got into motion, he acted as he did, it seems to me impossible to say that in so acting he was acting beyond the scope of his authority. The result is as summed up in the judgment below. "There was evidence of authority to remove a person in a wrong carriage abused by a blundering servant of the company in pulling the plaintiff out of the right one in the supposed 'interest of the company.'" If this be so, it is clear that the defendants are liable. There is a reasonable foundation of such liability. If the company employs porters at a station, who may necessarily, in the performance of their duties, have to exercise a discretion as to the application of personal force to passengers, they must take care that such porters are steady, trustworthy, and intelligent persons, by whom such a discretion may be properly exercised.

MELLOR, J., concurred.

PIGOTT, B. I agree, on the whole, that the judgment of the court below must be affirmed, though, I own, I think the case one that is very near the line.

LUSH, J. I also think the judgment should be affirmed. I base my judgment on the statement in the third paragraph that the porters' duty was to prevent persons from travelling in the wrong carriages. The porter here was endeavoring to prevent the plaintiff from travelling in the wrong carriage. It is true that *the plaintiff was not in truth in the wrong carriage, [156 but the porter thought that he was; and so clearly, in pulling him out, he was acting within the scope of his employment, and the company are responsible.

CLEASBY, B. It does not appear to me that the rules given to the porters are of very much importance in determining the case, for it seems clear that there are many cases beyond the rules in which the porters must act in their discretion as to what it may be best to do under the circumstances. It is stated in the judgment of the court below that there was evidence of authority: if so, of course the defendants may be made liable; but it seems to me that the case on appeal states rather indistinctly what the authority was. At the end of the third para-

graph it is stated that the porters' duty was to prevent persons from travelling in the wrong carriages. In paragraph 6 there is another statement as to the duty of the porters, which, I suppose, must be read as applying to a different class of circumstances. As the rest of the court are clear upon the statement in paragraph 8 that there was authority to remove a person from the wrong carriage, I am not prepared to differ from them. Then, if there were such authority, the case is clearly one of a servant doing, in an improper manner, what was within the scope of his employment, and the defendants must be responsible.

Judgment affirmed.

Attorneys for plaintiff: *Lewis & Sons, for Higginbotham & Barclay.*

Attorneys for defendants: *Cunliffe & Beaumont.*

See note 3 Eng. Rep., 818. In *Passenger R. R. Co. v. Young*, 8 Am. Rep., 78, 21 Ohio St. R. 518, a rail road company was held responsible for the act of its conductor in forcibly ejecting a passenger rightfully seated in one of its cars, therefrom, notwithstanding the willfulness or wrongful motive of the conductor in doing the act complained of. *Bryant v. Rich*, 106 Mass. 180, referred to in the note in 3 Eng. Rep., 818 is again reported in 8 Am. Rep., 811. In *Cosgrove v. Oyden* 49 N.Y., 255, the court of Appeals of New York held that the test of the master's responsibility for the act of his servant was whether

the act was done in the prosecution of the master's business and not whether it was done in accordance with or contrary to his instructions. In *Moore v. Metropolitan Rail. Co.*, ante p. 204; L. R. 8 Queen's Bench 36, 27 Law Times Rep., new series 579 (reversing, S. C. at nisi prius 25 id. 951), it was held that the company was responsible for the wrongful act of its conductor in ejecting a passenger for non-payment of additional fare which he had no right to demand. To the same effect is *Hamilton v. Third Av. R. R.* 13 Abb. N.S. 318, where the company was held liable for excessive force used by its conductor.

[Law Reports, 8 Common Pleas, 162.]

Nov. 16, 1872, Feb. 24, 1873.

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*HARVEY v. WALTERS.

Easement—Right of Eavesdropping—Alteration of Mode of Enjoyment—Trespass.

The plaintiff was the owner of certain premises, the eaves of which projected over adjoining land of the defendants and had become entitled by length of user to have the rain water drop from such eaves on to the defendant's land. The plaintiff in rebuilding his premises carried the wall abutting on defendant's land to a slightly greater height than before, and consequently raised the height of the eaves from the ground to the same extent:

Held, that in the absence of any evidence that a greater burden was thrown on the servient tenement by the alteration, the easement was not thereby destroyed, and the plaintiff was entitled to the right of eavesdrop from the premises as altered.

Thomas v. Thomas (2 C. M. & R., 34) followed.

The third count of the declaration alleged that the plaintiff was entitled to right of having rain-water drop from the eaves of certain roofs on the plaintiff's land on to the defendant's land adjoining, and of having the eaves of such buildings project over the defendant's land, and complained that the defendant wrongfully removed the said eaves and built upon the said land close to and higher than the said roofs, so as to prevent the said eaves from projecting over the said land, and the rain-water from dropping from the said eaves on the said land, &c.

Fourth count for negligence by the defendant in erecting certain buildings in close proximity to buildings of the plaintiff, so that the walls and roof of the plaintiff's buildings were injured and the spouts for carrying off the rain water from the said roof were damaged.

Pleas (*inter alia*); third plea to the third count denying that the plaintiff was entitled as alleged.

Fifth plea to the fourth count alleging that the plaintiff had wrongfully placed the spouts and part of the roof of plaintiff's buildings, so that they overhung defendant's land, wherefore defendant removed the same, doing no unnecessary damage, &c.

Issues.

At the trial before Quain, J., at the Nottingham Spring Assizes, the facts appeared to be as follows: The plaintiff and defendant *were owners of adjoining properties, and it was not de- [163] nied that the plaintiff had become entitled by user to a right of having the eaves, of buildings on his land project over the defendant's land, but the plaintiff had some short time before the action pulled down the buildings that had formerly stood on his land and rebuilt them, and in so doing had carried the wall on which the projections had been to a greater height than the old building, and so increased the height of the eaves from the ground by three or four courses of bricks. There was no alteration in the character of the eaves save the slightly increased height, nor was there anything to show that the water fell from the eaves in a different manner from that in which it had previously fallen so as to render the servitude more onerous. The defendant had thereupon removed some of the spouting of plaintiff's building and put back the eaves to make room for buildings which she erected on her own land. On these facts the verdict was entered for the plaintiff for 40s., leave being reserved to move to enter it for the defendant on the ground that the plaintiff had lost his right to have his eaves project over defendant's land by raising his roof.

A rule *nisi* having been accordingly obtained,

Nov. 16, 1872. *Field*, Q.C., and *Kennedy*, showed cause:

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There is nothing to show that in fact the servitude was made more onerous by the raising of the roof. The rule of the civil law appears to have been that the eaves might not be lowered but might be raised, the presumption being that the servitude would thereby, if anything, be made less onerous (see the citations in Gale on Easements, 4th ed., 559). In *Thomas v. Thomas* ⁽¹⁾, which is almost on all fours with the present case, it seems to have been laid down that in order to extinguish the easement there must be a substantial alteration of its character making it more onerous to the servient tenement. [They cited also *Hall v. Swift* ⁽²⁾; *Hale v. Oldroyd* ⁽³⁾.]

Cave and *J. C. Lawrence* supported the rule. The point seems to have been very slightly discussed in *Thomas v. Thomas* ⁽¹⁾, and the present case cannot be considered as concluded by that 164] decision. *This easement differs from many other easements, in that it involves a continuous enjoyment of the servient tenement. The projection of the eaves over the neighboring land is a trespass to such land: *Fay v. Prentice* ⁽⁴⁾ on the principle, *cujus est solum ejus est usque ad cælum*. What plaintiff claims to do is to remove his eaves from one place and commit a fresh trespass in another place. This he is not entitled to do. It is clear from many cases that the right to make any alteration in the circumstances of the easement is subject to the condition that no greater burden is thrown on the servient tenement, as, for instance, in *Garritt v. Sharp* ⁽⁵⁾. The defendant's right of building is restricted by raising the eaves. The same rule does not apply to the present case as to the cases of watercourses and lights. In those cases no doubt, if there is no substantial variation of the mode of enjoyment, the easement remains, but in neither of those cases is the inception of the easement a trespass. The owner of the dominant tenement cannot, in the case of an easement the inception of which is a trespass, alter the character of the easement so as to gain a different right from that which he had before, by committing a fresh trespass.

Field, Q.C., referred to *Pickering v. Rudd*. ⁽⁶⁾

Cur. adv. vult.

Feb. 24, 1873. The judgment of the court (Bovill, C.J., Grove and Denman, JJ.), was delivered by

GROVE, J. This action was tried before Quain, J., at the Nottingham Spring Assizes, 1872, when a verdict was found for the plaintiff, subject to a point reserved upon the 3d count of

⁽¹⁾ 2 C. M. & R., 34.

⁽²⁾ 4 Bing. N. C., 381.

⁽³⁾ 14 M. & W., 789.

⁽⁴⁾ 1 C. B., 828.

⁽⁵⁾ 3 A. & E., 325.

⁽⁶⁾ 4 Camp., 219.

the declaration, which was for an interference with a right of eaves dropping from a roof of the plaintiff upon the defendant's premises. A rule was subsequently obtained by Mr. Cave, on the part of the defendant, to enter the verdict for her upon the issues on this point, on the ground that plaintiff, by raising his roof, had lost the right to project his eaves and gutter over the defendant's land, and that is the only point which is open to the defendant on the present rule. The question was reserved at the trial, in order to enable the defendant to take the opinion of the court upon the point raised in *Thomas v. Thomas*.⁽¹⁾ But for the alteration the right to the easement was established by the evidence and the verdict of the jury. In 1867 the plaintiff made some alteration in his building, by which the eaves were raised higher by three or four courses of bricks, but the extent of projection of the eaves remained as before the alteration. Things being in this state, the defendant shortly before the time of the action removed some spouting, and put back the eaves to make room for some buildings which she erected, and thereby damaged the plaintiff by causing the water which had flowed off to percolate into crevices, and obliging him to construct a new gutter along the roof. It was contended by Mr. Cave, on behalf of the defendant, that by the change in the position of the eaves in 1867, the mode of enjoyment was changed and the easement destroyed. Mr. Field, on the other hand, contended, on the authority of *Thomas v. Thomas* ⁽¹⁾, that there being no substantial variance in the enjoyment the right to the easement was not affected. In that case, which was very similar to the present, and not distinguishable in principle from it, it was held that the raising a wall about three feet, from which water dropped on the servient tenement, and also slightly increasing the projection by substituting thatch for pantiles, did not destroy the easement. It was, however, argued by Mr. Cave that, on the principle of *cujus est solum ejus est usque ad cælum*, there was a trespass in this case which the person trespassed on had a right to abate. Mr. Field, contra, contended that the point did not arise upon the rule, and that in the case of *Pickering v. Rudd* ⁽²⁾ Lord Ellenborough held, that for nailing a board so as to overhang the plaintiff's close the proper remedy was case and not trespass; and, assuming the point as to trespass to be open to the defendant upon this rule, which was granted only on the point reserved at the trial, the original projection would seem to be the real trespass, and the projection above it a mere user of the space taken possession of by such trespass. The real and indeed the only point reserved, however, was whether the easement was destroyed by the alteration.

⁽¹⁾ 2 C. M. & R., 34.⁽²⁾ 4 Camp., 219.

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It is difficult to see how the mere raising of the eaves, which would, if anything, cause the water falling from them to become more dispersed, could affect injuriously the defendant's property. 166] No real *difference was pointed out to us in the effect of the slight raising of the height of the eaves. It did not appear that any greater burden was thereby cast upon the servient tenement, and in the civil law it was considered that the raising of the eaves diminished instead of increasing the burden of the servitus in the passage cited by Mr. Field.

It appears to us that to hold any, even the slightest, variation in the enjoyment of an easement would destroy the easement would virtually do away with all easements, as by the effect of natural causes some change must take place. Thus water percolating or flowing would produce some wear and tear, and alter the height or width of the conduit; so would weather, alterations of heat and cold, &c. In the case of ancient lights, changes in the transparency of glass, wear and tear of frames, growth of shrubs, &c., would produce effects which would vary the character of the enjoyment. In the user of a footpath the footsteps would never be on the same line, or confined accurately to the same width of road. We are of opinion that the question here, as in *Hall v. Swift* ⁽¹⁾ and other cases, is, whether there has been a substantial variance in the mode of or extent of user or enjoyment of the easement, so as to throw a greater burden on the servient tenement. In the language of Sir Richard Kindersley, which was adopted by the master of the rolls in the late case of *Heath v. Bucknell* ⁽²⁾, there must be an additional or different servitude, and the change must be material either in the nature or in the *quantum* of the servitude imposed. It was not suggested, nor was there any evidence that any such additional burden had been cast upon the defendant's premises by the alteration in this case, and therefore we are of opinion that the defendant is not entitled to have the verdict entered in her favor upon the issues in question, and that the present rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *Purkis & Perry, for William Williams, Nottingham.*

Attorneys for defendant: *Field & Roscoe, for Enfield & Dowson, Nottingham.*

⁽¹⁾ 4 Bing. N. C., 381.

⁽²⁾ Law Rep. 8 Eq., at p. 5.

As to what change in the manner of the enjoyment of an easement will prevent its acquirement by an adverse enjoyment and as to what is not such a

change as to destroy one acquired; See Washburne's Easements, 144-8, 2d ed. Goddard on Easements 25, 188, 193, 200, 207, 302-5.

[Law Reports, 8 Common Pleas, 167.]

Feb. 6, 1878.

*ROPER and ANOTHER v. JOHNSON.

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Contract — Measure of Damages in an Action for Breach of Contract for Forward Monthly Deliveries — Breach before the Time for Complete Performance.

The defendant in April agreed to sell and the plaintiffs to buy 3000 tons of coal at 8s. 6d. per ton, "to be taken during the months of May, June, July, and August." No coal having been taken by the plaintiffs in May, the defendant wrote on the 31st of that month desiring the plaintiffs to consider the contract cancelled. The plaintiffs did not assent to this; but on the 11th of June the defendant definitively refused to deliver any coal, and on the 3d of July the plaintiffs brought an action for this breach.

At the trial, which took place on the 13th of August, the plaintiffs, proved that the price of coal had risen during the whole period since the beginning of May, and was still rising. No evidence was given to show whether the plaintiffs could have gone into the market and obtained a new contract for coals.

Held, that in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried.

DECLARATION that the plaintiffs bargained and agreed with the defendant to buy of him, and the defendant agreed to sell to the plaintiffs, 3000 tons of coal, at 8s. 6d. per ton, less 2½ per cent. discount, to be delivered during the months of May, June, July, and August, 1872, at the defendant's colliery, Hindley Green, St. Helens; that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to have the coal delivered as aforesaid; yet the defendant did not deliver the coal to the plaintiffs, and refused to deliver the same; whereby the plaintiffs had been deprived of the profits which would have accrued to them from the delivery of the same, and had been prevented from performing a contract made by them with W. B. for the sale to him of the coal at greatly increased prices, which last mentioned contract was made on the faith of the agreement with the defendant; and by reason of the premises the plaintiffs had become and were liable to W. B. for damages for the non-performance of the last mentioned contract. Claim, 1000*l*.

Pleas, 1, that it was not agreed as alleged; 2, a denial of the *alleged breach; 3, that before breach the plaintiffs exo- [168
nerated and discharged the defendant from performance of the agreement; 4, that the plaintiffs were not ready and willing to accept the goods according to the terms of the agreement; 5, that the plaintiffs were not ready and willing to pay for the goods according to the terms of the agreement; 6, that the alleged

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agreement was contained in certain letters written by and between and signed by the plaintiffs and defendant respectively, and was made subject to certain terms and conditions then agreed upon by and between the plaintiffs and the defendant, and contained therein, that is to say, upon the terms or conditions that the plaintiffs should pay cash for the goods before delivery thereof by the defendant, or should furnish the defendant with references satisfactory to the defendant of the plaintiffs' solvency and means; that although all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the defendant to a performance by the plaintiffs of their promise, yet the plaintiffs did not nor would pay to the defendant cash for the goods before delivery thereof, and did not nor would furnish the defendant with references satisfactory to the defendant of the plaintiffs' solvency and means and that the defendant was prevented from performing the agreement on his part by the said neglect and default of the plaintiffs. Issue thereon ⁽¹⁾.

The cause was tried before Brett, J., at the last Summer Assizes at Liverpool. The plaintiffs are colliery proprietors and coal merchants carrying on business at Ackhurst Hall Colliery, near Wigan, and also at Manchester. The defendant is a colliery proprietor at Hindley Green, St. Helen's. In April, 1872, a negotiation took place between the plaintiffs and the defendant for the sale by the latter to the former of 3000 tons of coal to be delivered in equal monthly quantities during the months of May, June, July, and August. Subsequently, the following correspondence passed between the parties:

April 18th, 1872. Defendant to plaintiffs: "I beg to inform you that my lowest price for coal at pit is 8s. 6d. per ton, less [69] 2½ per cent. discount; but could not bind myself to supply the quantity named."

April 25th, 1872. Defendant to plaintiffs: "According to my promise to-day, I now offer you 3000 tons of coal to be delivered during the months of May, June, July, and August, at 8s. 6d. per ton, less 2½ per cent discount, at my colliery, Hindley. This offer to remain open until Monday next."

April 26th, 1872. Plaintiffs to defendant: "We hereby accept your offer of 3000 tons of Wigan, 4 and 5 foot coal, at 8s. 6d. per ton, less 2½ per cent. discount, at your siding, Hindley Green, to be taken during the months of May, June, July, August, and September next. We have added September, in

⁽¹⁾ There was also a demurrer to the sixth plea: but by order of Willes, J., the issues of fact were first tried.

accordance with the arrangement entered into personally yesterday."

April 27th, 1872. Defendant to plaintiffs: "I can only deliver during the Months of May, June, July, and August, and to be exempt in case of strikes and accidents. As you are strangers to me, I shall require cash or a satisfactory reference."

April 29th, 1872. Plaintiffs to defendant: "We agree to take delivery in the months named, viz. May, June, July, and August, although we think it rather strange, after the previous understanding. With regard to references, you had better make your own inquiries about us; and, if they do not result satisfactory, we will pay cash."

April 30th, 1872. Plaintiffs to defendant: your favor of this morning is to hand. ⁽¹⁾ We think you are giving yourself unnecessary trouble. We thought you would make the usual inquiry through your bankers. However, we beg to refer you to the Manchester and Liverpool District Bank, Wigan. We purpose taking the coal in regular daily quantities in your wagons, and propose sending your instructions in the course of next week."

May 31st, 1872. Defendant to plaintiffs: "As you have not taken the coal according to arrangement, you must consider the contract cancelled."

June 1st, 1872. Plaintiffs to defendant "yours of the 31st ultimo duly received, in which you say that the contract for 3000 tons coal must be considered cancelled. In reply, we beg to *say that we are not aware of any circumstances to [170 justify the same, and therefore consider the contract as still in force."

June 10th, 1872. Plaintiffs to defendant: "We beg to inform you that we have ordered twenty-five wagons to be sent to your colliery, which be good enough to load and forward to Garston to our order. The wagons will be kept constantly running, so that deliveries will be steadily taken."

June 11th, 1872. Defendant to plaintiffs: "I am in receipt of your's of yesterday, and beg to state I shall not load your wagons if sent to my colliery. The terms of my offer in my letter to you of the 25th of April last not having been accepted, I cannot now supply you with coal until the price and conditions are first arranged. I left the matter open from the 25th of April to the 31st of May, to enable you to accept my proposal.

(*) The letter referred to was not put in.

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you not having done so, I wrote you on the latter date to the effect that you might consider our negotiation as to the 3000 tons at an end."

June 12th, 1872. Plaintiffs to defendant: "We are in receipt of your favor of the 11th. The 3000 tons of coal bought from you are already sold, and we have sent wagons to your colliery to be filled; in default of which, we shall charge you with demurrage, as we consider that nothing has occurred to invalidate the contract."

June 15th, 1872. Plaintiffs to defendant: "We have forwarded to Swan Lane Colliery nine wagons, which arrived at your siding yesterday. Be good enough to load them on our account, and give them quick dispatch, as we have a vessel waiting to be filled."

June 19th, 1872. Plaintiffs' attorneys to defendant: "Messrs. Roper & Co., have consulted us upon the subject of your breach of contract relative to 3000 tons of coal; and we beg to inform you that, unless the amount of the damage sustained by our clients, 300*l.*, be paid to us by Friday next, a writ will be issued against you."

The defendant replied, referring to his solicitor; and the writ in this action was issued on the 3d of July.

The plaintiffs claimed to be entitled to damages estimated according to the advance in the market price of coal at the [171] *various periods at which the coal contracted for should have been delivered, viz. in equal monthly quantities, 750 tons in each of the four months of May, June, July, and August. It was proved that, from the 14th to the 29th of May, the market price of coal had advanced (in Liverpool where the contract was made), 6*d.* per ton; between the 29th and 31st, 1*s.* 6*d.* per ton; between the 1st and 30th of June, 2*s.* per ton; between the 1st and 15th of July, 2*s.* 6*d.* per ton; between the 15th and 19th, 3*s.* 6*d.* per ton; between the 19th of July and the 15th of August, 5*s.* per ton; and between that day and the 31st of August, it was estimated that the risé would be 10*s.* per ton. The trial took place on the 13th of August. In addition to this, the plaintiffs claimed a sum for wagon expenses or demurrage (¹), their whole claim amounting to 505*l.* 2*s.* 5*d.*

For the defendant it was insisted that, the plaintiffs not having taken any coal in all the month of May, the defendant was entitled to declare the contract at an end; that, assuming the plaintiffs to be entitled to recover anything, the utmost damages they could claim would be the difference between the contract

(¹) This claim was abandoned on the argument of the rule.

price and market price of coal on the day on which the defendant refused to perform the contract; and that, at all events, they were not entitled to speculate upon the possible rise in the market after the day of trial.

A verdict was taken for the plaintiffs for 505*l.* 2*s.* 5*d.*, subject to leave reserved to the defendant to enter a verdict for him or a nonsuit, if the court should be of opinion that the plaintiffs, not having performed the contract by taking any coal in May, were not entitled to recover; or to reduce the damages to such sum as the court should direct.

A rule having been obtained accordingly.

Holker, Q.C., and *Dixon*, showed cause. The first branch of the rule is disposed of by *Simpson v. Crippin* ⁽¹⁾, which was decided in the Queen's Bench after this rule was granted. There, the defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into the plaintiffs' wagons at *the defendants' collieries, in equal monthly quantities, [172 during the period of twelve months, at 5*s.* 6*d.* per ton. During the first month the plaintiffs sent wagons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal. The court held that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract.

[*Herschell, Q.C.*, admitted that he could not in this court argue in support of the first branch of the rule, but must confine himself to the reduction of damages.]

There was a complete contract on the 29th, or at the latest on the 30th of April, under which the plaintiffs bound themselves to take and the defendant bound himself to deliver 750 tons of coal in each of the months of May, June, July, and August. The jury have assessed the damages at the difference between the contract price and the market price at each of the periods when the coal ought to have been delivered. It will be said that the damages should have been assessed at the difference of price on the 31st of May, when the defendant intimated to the plaintiffs that they must consider the contract cancelled. But the defendant clearly had no right to repudiate the contract because the plaintiffs had not taken any coal in the month of May. That is settled by *Simpson v. Crippin*. ⁽¹⁾ If the plaintiffs had waited until the end of August before they brought their action, it would be conceded that they would have been

⁽¹⁾ Law Rep., 8 Q. B., 14.

entitled to recover the whole damages which the jury have given. Why should the fact of the action having been brought before that time, upon the principle laid down in *Hochster v. De La Tour* ⁽¹⁾ and *Danube and Black Sea Company v. Zenos* ⁽²⁾, the defendant having definitively refused to perform the contract, make any difference? In *Simpson v. Crippin* ⁽³⁾, the action [173] was brought at the end of the sixth *month. In the then state of the market, it was impossible for the plaintiffs to obtain a new forward contract upon such favorable terms: the ordinary rule, therefore, cannot apply to such a case. In *Brown v. Muller* ⁽⁴⁾, the plaintiff bought of the defendant 500 tons of iron, to be delivered in about equal proportions in September, October, and November, 1871. In August, 1871, the defendant gave notice that he did not intend to deliver any iron. In December, the plaintiff commenced an action for non delivery, and claimed as damages the difference on the 30th of November between the contract and market prices of the iron: and it was held that the proper measure of damages was the sum of the differences between the contract and market prices of one-third of 500 tons on the 30th of September, the 31st of October, and the 30th of November respectively. It is true that the period for the delivery of the last of the iron had expired at the time of action brought; but in all other respects that case is wholly undistinguishable from the present. Kelly, C.B., in giving judgment, says ⁽⁵⁾: "The case of *Frost v. Knight* ⁽⁶⁾ has been referred to as showing that there is a difference between cases where the contract is treated as still subsisting and where it is treated as at an end. Now, the plaintiff might, if he had so elected, have treated the contract as at an end when the defendant announced his intention to break it. But that is a matter of election on the plaintiff's part; and, even although he had elected thus to treat the contract, yet, in considering the question of damages, they would still be estimated with reference to the times at which the contract ought to have been performed, that is, in this case, at the end of the months of September, October, and November." Martin, B., says: "In deference to authority, I come to the same conclusion. But, for my part, I should have been disposed to think that the damages ought to have been estimated once for all when a complete breach of the contract had been committed. But the cases of *Boorman v. Nash* ⁽⁷⁾ and *Josling v. Irvine* ⁽⁸⁾ decide the matter." And [174] Channell, B., said: "I by no means *desire to interfere

⁽¹⁾ 2 E. & B., 678; 22 L. J., (Q.B.), 455.

⁽⁵⁾ Law Rep., 7 Ex., at p. 323.

⁽²⁾ 11 C. B. (N.S.), 152; 13 C. B. (N.S.),

⁽⁶⁾ Law Rep., 5 Ex., 322; in error,

325; 31 L. J. (C.P.), 84, 284.

Law Rep., 7 Ex., 111.

⁽³⁾ Law Rep., 8 Q.B., 14.

⁽⁷⁾ 9 B. & C., 145.

⁽⁴⁾ Law Rep., 7 Ex., 319.

⁽⁸⁾ 6 H. & N., 512; 30 L. J., (Ex.), 78.

with the rule that, where there is a contract to deliver goods on a specific day, the proper measure of damages is the difference on that day between the market and contract prices. But, where the contract is to deliver in parcels at definite but different times, as here, at the end of the three months of September, October, and November, there I think the difference should be taken at the end of each period. The cases of *Boorman v. Nash* ⁽¹⁾ and *Josling v. Irvine* ⁽²⁾ are express on this point."

Herschell, Q.C., and *Baylis*, in support of the rule. Having elected to treat the contract as at an end by bringing their action (on the 3d of July), the damages are to be assessed with reference to the price at which the plaintiffs might have gone into the market on that day and obtained a contract for coal of the particular description.

[BRETT, J. What evidence was there, or what probability, that they could have obtained a contract for forward deliveries at the market-price of that day?]

The onus of proving the damage they had sustained lay upon the plaintiffs. *Brown v. Muller* ⁽³⁾ is no authority here: the action there was not brought until the period for the last delivery had elapsed: consequently, the *dicta* relied on were unnecessary and *obiter*. And even there, Bramwell, B., who had left the court before the judgment was pronounced, seems to have thought that the plaintiff ought to have endeavored to get a new contract as soon as there was a complete breach. He says in the course of the argument ⁽⁴⁾: "Quite apart from *Hochster v. De la Tour* ⁽⁵⁾, there was an absolute breach at the end of September. Ought not the plaintiff, either when the defendant repudiated or at the end of the first month, to have endeavored to provide himself with another contract?" *Hochster v. De la Tour* ⁽⁶⁾ was the first case that started this description of question. A different rule was acted upon in *Phillpotts v. Evans*. ⁽⁷⁾

[KEATING, J. In the earlier part of his judgment in *Brown v. Muller* ⁽¹⁾, Kelly, C.B., says that the plaintiff was not bound to *go into the market when the first breach took place and [175 endeavor so obtain a similar contract, which might or might not turn out to be beneficial, and which might in one event give the defendant a right to complain.

[BRETT, J. You are arguing for what Martin, B., wished was the rule; but all the three judges gave deliberate judgments the other way.]

⁽¹⁾ 9 B. & C., 145.

⁽²⁾ 6 H. & N., 512; 30 L. J. (Ex.), 78

⁽³⁾ Law Rep., 7 Ex., 319.

⁽⁴⁾ Law Rep., 7 Ex., at p. 320.

⁽⁵⁾ 2 E. & B., 678; 22 L. J. (Q.B.), 455.

⁽⁶⁾ 5 M. & W., 475.

⁽⁷⁾ Law Rep., 7 Ex., at p. 322.

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This point did not arise in that case. Here, the court may fairly assume that the plaintiff might have obtained a contract at the price of the day on which the action was brought; consequently, the damages should be estimated, at the highest, at an advance of 2s. 6d. per ton on 2250 tons; the plaintiffs not being entitled to claim in respect of the non delivery of 750 tons in May. Even according to the plaintiffs' view, there was no actual advance, at the time the action was commenced, beyond 5s. per ton. Contracts for forward delivery are by no means rare. Such contracts were made in *Hoare v. Rennie* ⁽¹⁾ and *Simpson v. Crippin* ⁽²⁾.

C. Russell, Q.C., intimated his willingness to consent to a reduction of the damages, at the suggestion of the court, to 400l.

KEATING, J. The question in this case arises upon a contract by which the defendant agreed to deliver coals to the plaintiffs at certain specified periods, at 8s. 6d. per ton. The quantity to be delivered was 3000 tons, and the deliveries were to take place in the months of May, June, July, and August, 1872. There was some controversy as to the facts; but there can be no doubt that the defendant, soon after the contract was entered into, intimated his determination not to perform it; and it seems to be agreed that, at all events, that repudiation of the contract was accepted by the plaintiffs on the 3d of July, when they brought this action for the non performance of it. The difficulty as to the measure of damages, or rather as to the principle on which the damages are to be assessed, arises from the circumstance of the time for delivery of the coal extending over the whole of the month of August. Had the action been delayed until after the expiration of the time for the completion [176] of the contract, we should have entertained but *little doubt; for, the case would then have been distinctly within the authority of *Brown v. Muller* ⁽³⁾, and we should have considered ourselves bound by that decision. But the difficulty here arises from the fact of the action having been brought on the 3d of July. In *Brown v. Muller* ⁽³⁾ it was clearly decided that, where the contract is for the delivery of goods in equal proportions in a given number of months, and the action for non delivery is not brought until after the expiration of the period stipulated for the last delivery, the proper measure of damages is the sum of the differences between the contract and market prices on the last day of each month respectively. That was the proper measure of damages there. But here the breach occurred before the end of the period over which the contract extended; and the question is, what is the proper measure of

⁽¹⁾ 5 H. & N., 19; 20 L. J. (Ex.), 73

⁽²⁾ Law Rep., 8 Q.B., 14.

⁽³⁾ Law Rep. 7 Ex., 319.

damages in such a case. Mr. Herschell in his very able argument insisted that the true measure is the loss which had resulted to the plaintiffs at the time of such breach, and that the mode of ascertaining the amount of such loss is to inquire upon what terms the plaintiffs could have gone into the market and obtained a similar contract on that day. That, it is said, is the true and only measure of damages in such a case; and hence it is contended that it was incumbent on the plaintiffs here to give evidence of loss ascertained in that manner, by showing what would be the difference between the contract price and the price at which they could have obtained a similar contract on the day of the breach, or that they were unable to obtain such a contract at all. Now, it appears to me that the plaintiffs cannot be called upon to give evidence of that sort. The rule laid down by the Court of Exchequer in *Brown v. Muller* ⁽¹⁾ is to be applied to the present case *cy pres*. The judges there in reality did go into the question which arises here; and the lord chief baron, and Martin and Channell, BB., pronounced opinions which are distinctly in favor of the plaintiffs in this case. Mr. Herschell is undoubtedly justified in saying that those judgments are to a certain extent *obiter*. Still they come to us recommended by very high authority; and I am disposed to concur in them.

The difficulty which presents itself here is introduced by the comparatively recent case of *Hochster v. De la Tour* ⁽²⁾ the first case *which decided that, in the case of an executory [177 contract, the refusal of one party to perform the contract would justify the other in at once treating such refusal as a breach, and suing for damages. That case has been distinctly recognized on many subsequent occasions, and we must now assume it to be law. It has undoubtedly introduced a difficulty in the assessment of damages in similar cases. It was followed in *Frost v. Knight* ⁽³⁾ in the Court of Exchequer, and the Exchequer Chamber ⁽⁴⁾ also professed to act upon it. It was not necessary in either case to decide what the damages actually were in moneys numbered. But we are not left without some light upon the subject; for Cockburn, C.J., lays down the rule which I for one am prepared to act upon here, and in the same terms in which it was laid down by the three judges in *Brown v. Muller* ⁽¹⁾, viz. that the periods of time at which the difference of price on a contract of this kind is to be taken, are the periods of time at which the deliveries would have taken place had the contract been performed. Cockburn, C.J., in delivering what must be assumed to be the judgment of the whole Court of Ex-

⁽¹⁾ Law Rep., 7 Ex., 819.

⁽²⁾ Law Rep., 5 Ex., 322.

⁽³⁾ 2 E. & B., 678; 22 L. J. (Q.B.), 455.

⁽⁴⁾ Law Rep., 7 Ex., 111.

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chequer Chamber in *Frost v. Knight* ⁽¹⁾, says: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour* ⁽²⁾ and *The Danube and Black Sea Company v. Zenos* ⁽³⁾ on the one hand, and *Avery v. Bowden* ⁽⁴⁾, *Reid v. Hoskins* ⁽⁵⁾, and *Barrick v. Buba* ⁽⁶⁾, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but, in that case, he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his pre-178] vious repudiation of it, but also to *take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non performance of the contract at the appointed time." And he adds this qualification,— "Subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." That seems to me to get rid of the argument urged on the part of the defendant, viz., that the true and only measure of damages in such a case as this is, the loss which the plaintiffs have sustained in consequence of the defendant's failure to perform the contract; that the mode of estimating that loss is by ascertaining the difference between the contract price and the price at which the plaintiffs might have obtained a new contract on the day of the admitted breach: and that it was for the plaintiffs to show what that difference was, either by having entered into such a contract, or by proof of their inability to obtain one.

It seems to me that, when the plaintiffs have shown that there has been a distinct breach of the contract on the part of the defendant, and have further shown that at the periods at which the coals should have been delivered, they could only have obtained them at an advanced price, they were entitled to the difference between that advanced price and the contract price,

⁽¹⁾ Law Rep., 7 Ex., at p. 112.

⁽²⁾ 2 E. & B., 678; L. J. (Q.B.), 455.

⁽³⁾ 13 C. B. (N.S.), 825; 81 L. J. (C.P.),

284.

⁽⁴⁾ 5 E. & B., 714; 26 L. J. (Q.B.), 8.

⁽⁵⁾ 6 E. & B., 953; 26 L. J. (Q.B.), 3.

⁽⁶⁾ 2 C. B. (N.S.), 563; 26 L. J. (C.P.),

280.

unless the defendant gave evidence that another similar contract might have been obtained on more mitigated terms. For instance, if there had been a fall in the market, or any other circumstance calculated to diminish the loss, it would be for the defendant to show it. This is the best conclusion I have been able to arrive at; and it has the support of the opinions of three judges of the Exchequer in *Brown v. Muller* ⁽¹⁾. I think it is the better and the safer rule: though I am free to confess that the matter is by no means divested of difficulty,—a difficulty occasioned by the novel doctrine introduced by the case of *Hochster v. De la Tour*. ⁽²⁾ But it seems to me that it is a rule which is more likely to avoid *those difficulties [179 than the other rule which has been suggested by Mr. Herschell.

The rule will, therefore, be made absolute to reduce the damages to 400*l.*, the sum agreed upon between the parties.

BRETT, J. This is an action brought upon a contract for the purchase and sale of marketable goods, whereby the defendant undertook to deliver them in certain quantities at certain specified times; and the action is brought for the non-performance of that contract. Now, in ordinary cases, the contract is to deliver the goods on a specified day, and there is no breach until that day has passed. In the case of marketable goods, the rule as to damages for breach of the contract to deliver is, the difference between the contract-price and the market-price on the day of breach. That is perfectly right when the day for performance and the day of breach are the same. Another form of contract is, as in *Brown v. Muller* ⁽¹⁾, to deliver goods in certain quantities on different days. The effect of the judgment in that case is that, the contract being wholly unperformed, there is a breach, a partial breach, on each of the specified days; such breaches occurring on the same days as the days appointed for the performance of the several portions of the contract. But the case of *Hochster v. De la Tour* ⁽²⁾ introduced this qualification, that, where one party, before the day for the performance of the contract has arrived, declares that he will not perform it, the other may treat that as a breach. That complication has arisen here: the contract being for the delivery of the goods on future specified days, the defendant has before the time appointed for the last delivery declared that he will not perform the contract, and the plaintiffs have elected to treat that as a breach and to bring their action.

Now, to entitle a plaintiff to recover damages in an action upon a contract, he must show a breach and that he has sustained damage by reason of that breach. These two are quite distinct. All that *Hochster v. De la Tour* ⁽²⁾ decided was this,

⁽¹⁾ Law Rep. 7 Ex., 819.

⁽²⁾ 2 E. & B. 678; 22 L.J. (Q.B.), 455.

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that, if before the day stipulated for performance, the defendant declares that he will not perform it, the plaintiff may treat that declaration as a breach of the contract, and sue for it. Now [180] comes the question whether in *such a case as this there is to be a different rule as to proof of the amount of damage which the plaintiff has suffered. The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract-price and the market price on the day of the breach. It appears to me that what is laid down by Cockburn, C.J., in *Frost v. Knight*, in the Exchequer Chamber (!), involves the very distinction which I am endeavoring to lay down, viz. that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; and that, when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach. Now, how does the chief justice deal with the matter? He deals first with the case of an action brought after the day for performance. He says: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non performance: but, in that case, he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it." He then treats of the other case: "On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such [181] damages as would have arisen from *the non performance of the contract at the appointed time," that is, from non performance of the contract at the time or times appointed for its

(!) Law Rep., 7 Ex., 111.

performance. That clearly negatives Mr. Herschell's argument, and gives the rule for the assessment of damages in the way I have stated, viz. that they must be such as the plaintiffs would have sustained at the day appointed for performance of the contract. Then he goes on and shows the real distinction between the cases he has put, "subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

He says further: "The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties; and, though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non fulfillment of the contract; and, in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been or would have been diminished." He uses the very term I used in the course of the argument, and which Mr. Herschell objected to, viz: "ought to have done." It seems to me to follow from that ruling that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that *prima facie* that is the proper measure of damages; leaving it to the defendant to show circumstances which would entitle him to a *mitigation. No such circumstances appeared [182 here: there was nothing to show that the plaintiffs ought to have or could have gone into the market, a rising market, and obtained a similar contract. But I cannot help thinking that the chief justice's judgment in the case last referred to goes further, and says in effect that the plaintiffs were not bound to attempt to get a new contract. It was upon precisely the same

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argument that the chief baron in *Brown v. Muller* ⁽¹⁾ decided against Mr. Herschell that the plaintiff there, as a reasonable man, was not bound to make a forward contract. Baron Martin held the same, though apparently with some reluctance: but no doubt is expressed in the judgment of Baron Channell. If we had been altogether without authority, I should have come to the same conclusion. But I think we are bound by the authority of *Frost v. Knight* ⁽²⁾, and *Brown v. Muller* ⁽¹⁾.

GROVE, J. I have come to the same conclusion, notwithstanding that I have entertained considerable doubt during the argument, particularly upon the first proposition, as to which I desire not to pronounce any opinion. Upon the second point I entirely agree with the rest of the court, viz: whether there was any evidence upon which we could act. As to the first question I probably should have felt myself bound by the opinions expressed by the judges in *Brown v. Muller* ⁽¹⁾, though strictly *obiter*; for the action there was not brought until after the expiration of the last period stipulated for the delivery of the iron while here, there was evidence that the plaintiffs had accepted the defendant's renunciation of the contract, and had assented to its being put an end to at the latest on the 3d of July. But, taking it upon Mr. Herschell's own view, his second proposition clearly was not made out. There was an admitted breach: and the question was, at what extra cost to themselves could the plaintiffs then have placed themselves in the same position they would have been in if the defendant had performed his contract. Was there any evidence upon which the court could rely in support of the proposition that the plaintiffs could at the time of the admitted breach have gone into the market and made a similar contract? I cannot gather from the notes of the learned 1837 judge who tried the cause that there was any evidence upon which the jury could have come to such a conclusion.

I agree that the market price, though commonly used as a test, is not the only one. If in this case the defendant could have shown that the plaintiffs might have gone into the market on the day of breach and made a forward contract at the then market price, and that they had not attempted to avail themselves of the opportunity, the jury might undoubtedly have taken that into consideration in reduction of the plaintiffs' loss; and we might have done so too. The case would then have been within the principle of *Hochster v. De la Tour* ⁽³⁾. Lord Campbell there says ⁽⁴⁾; "It is much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to con-

⁽¹⁾ Law Rep., 7 Ex., 319.

⁽²⁾ 2 E. & B., 678; 22 L. J. (Q. B.), 455.

⁽³⁾ Law Rep., 7 Ex., 111.

⁽⁴⁾ 2 E. & B. at p., 690.

sider himself absolved from any further performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Instead of remaining idle, and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract." And further on he says ⁽¹⁾: "An argument against the action before the 1st of June (the day on which the employment of the plaintiff as courier was to commence) is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial." Now, if there had been any materials here to show that at the time of the breach the plaintiffs could without extraordinary trouble have entered into a forward contract at the then market price, the jury might have taken them into consideration in mitigation of the damages. But there was no such evidence here; and we cannot act upon any conjecture of our own; we can only deal with the evidence as it stood before the jury. There is a different mode of dealing in each particular trade: [184 but, upon a rule to reduce the damages, we can only take notice of the ordinary incidents of a contract. The expression "mitigation" used in the judgment of Cockburn, C. J., in *Frost v. Knight* ⁽²⁾, rather shows that the onus of proof lies on the defendant. The plaintiffs having made out a *prima facie* case of damages, actual and prospective, to a given amount, the defendant should have given evidence to show how and to what extent that claim ought to be mitigated. No such evidence was attempted to be given. It is entirely upon the absence of that evidence that I rest my judgment. The other point is one deserving of serious consideration. The opinions of Kelly, C.B., and Channell, B., upon the point, in *Brown v. Muller* ⁽³⁾, are clear in favor of the plaintiffs; and Martin, B., did not dissent, though he seems to have assented with some reluctance.

KEATING, J. The result will be that the rule will be made absolute to reduce the damages to 400*l.*, but discharged as to the rest; and each party, we think, should bear his own costs of the rule. *Rule absolute.*

Attorneys for plaintiffs: *Sewell & Edwards for Henwood & Marley, Manchester.*

Attorney for defendant: *John Richardson, Manchester.*

⁽¹⁾ 2 E. & B. at p. 691. ⁽²⁾ Law Rep., 7 Ex., 111. ⁽³⁾ Law Rep., 7 Ex., 819.

C A S E S

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXVI VICTORIA.

[Law Reports, 8 Exchequer, 1.]

Nov. 14, 1872.

1]

*BRADBURY and Others v. HOTTEN.

Copyright — Infringement — Appropriation of Pictures — Book — Sheet of Letterpress — 5 & 6 Vict. c. 45, ss. 2, 15.

The plaintiffs are the proprietors of a weekly periodical called "*Punch*." Between the years 1849 and 1867 they published in nine several numbers nine cartoons, with descriptive writing underneath them with reference to the Emperor Napoleon III. In 1871 the defendant published a work called "*The Man of his Time*," consisting, first, of the "*Story of the Life of Napoleon III.*, by James M. Haswell;" and, secondly, of "*The same Story as told by Popular Caricaturists of the last Thirty Years*." Among the caricatures in part 2, were copies in a reduced form, sometimes with and sometimes without the descriptive writing, of the nine cartoons above mentioned. No consent from the plaintiffs to this reproduction had been obtained. In an action by them for infringement of their copyright in the several books or "sheets of letterpress" containing the cartoons:

Held, that a substantial part of the plaintiffs' books, or sheets of letterpress, had been appropriated, and that they were entitled to recover.

DECLARATION: 1st count, that the plaintiffs were the proprietors of a subsisting copyright in a book or sheet of letterpress separately published, entitled "*Punch*;" or, *the London Charivari*," and numbered 391, and the defendant after the passing of 5 & 6 Vict. c. 45, wrongfully, and without the consent in writing of 2] the plaintiffs, *printed, or caused to be printed, for sale, divers copies of certain parts of the said book or sheet of letterpress, contrary to the said statute.

2d to 9th counts for similar infringements by copying parts of other numbers of *Punch*.

Plea: Not guilty. Issue.

The cause was tried at the Middlesex sittings after Trinity Term, 1872, before Bramwell, B., when it was proved that the plaintiffs were the owners of the copyright of the weekly periodical called "*Punch*," and that between the years 1849 and 1867 (viz., in 1849, 1851, 1853, 1854, 1855, 1859; and 1867) they had published in that periodical the nine woodcuts mentioned in the declaration, with descriptive words printed beneath them, illustrative of the career of the Emperor Napoleon III. These woodcuts were reproduced by the defendant, without the plaintiffs' consent, in a book published by him in 1871, in a reduced form, sometimes with and sometimes without the descriptive letterpress. The defendant's book was entitled "The Man of his Time," and consisted of two parts: part 1 being "The Story of the Life of Napoleon III., by James M. Haswell," and part 2 being "The same Story as told by Popular Caricaturists of the last Thirty Years." The second part, in addition to the nine pictures selected from *Punch*, contained many other illustrations from English and foreign comic journals. A verdict was entered, upon proof of these facts, for the plaintiffs for 40s., with leave to move to enter a verdict for the defendant.

A rule *nisi* was afterwards obtained accordingly, on the ground that there was no evidence of any infringement of copyright, the court to draw such inferences as a jury might ⁽¹⁾.

Manisty, Q.C., and *R. G. Williams*, showed cause. This is a clear case of infringement. The defendant has appropriated nine cartoons from nine different numbers of *Punch*. Each number is *a "sheet of letterpress" and a "book" within the [3 meaning of 5 & 6 Vict. c. 45, s. 2. The cartoon is part and parcel of the sheet of letterpress, and to take out the cartoon either with or without the descriptive writing is piracy: *Bogue v. Houlston* ⁽²⁾.

[CHANNELL, B. The question really is whether in its new form each picture is not part of a new and original production though copied from an old one.]

The new work reproduces the old illustrations for the same

⁽¹⁾ 5 & 6 Vict. c. 45, s. 15, enacts that if any person shall in any part of the British dominions print or cause to be printed either for sale or exportation any book in which there shall be subsisting copyright without the consent in writing of the proprietor thereof . . . such offender shall be liable to a special

action on the case at the suit of the proprietors of such copyright." Sect. 2 enacts that the word "book" shall be construed to mean and include "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published."

⁽²⁾ 5 De G. & S. 267; 21 L. J. (Ch.), 470.

1872

Bradbury v. Hotten.

purpose as that for which they were originally published — to excite amusement. Nor are the appropriations insignificant. These cartoons were originally produced with great labor and at great expense, and if they may be collected and republished in the lives of the various persons to whom they refer, the plaintiffs' property will be materially affected.

[BRAMWELL, B. The intuitus with which the pictures are taken is what must chiefly be considered. Suppose an author wrote a book of travels and incidentally described the composition of some favorite dish, and then the writer of a cookery manual copied the description, that would not be piracy.]

No: because there the objects of the two works are entirely different. Here the reproduction is for the same object as the first publication. There is an appropriation of labor paid for by the plaintiffs for the defendant's own purposes: *Hotten v. Arthur* ⁽¹⁾; *Campbell v. Scott* ⁽²⁾; *Sweet v. Maugham* ⁽³⁾; *Sweet v. Benning* ⁽⁴⁾; *Archbold v. Sweet*. ⁽⁵⁾

[BRAMWELL, B. Suppose a man selects a few verses from a book of poetry and sets them to music, would that be piracy?]

Yes, if an appreciable part of the book were taken, although no doubt, a verse might, under some circumstances, be adopted without objection. In the present case the most valuable parts of the periodical are in each instance selected, and it is no excuse that the defendant has not taken more.

Parry, Serjt., and *J. O. Griffiths*, in support of the rule. The defendant's work is a new and original one, and the pictures reproduced are taken not from *Punch* only, but from other 4] comic *journals. Nor are all the pictures in *Punch* relating to the emperor taken, but only a few, illustrating particular passages in his life. There is nothing in common between the purposes of the defendant and that of the plaintiffs. A different object is aimed at and a different class of readers appealed to, and the defendant has only made a fair and legitimate use of the plaintiffs' labors: *Martin v. Wright* ⁽⁶⁾; *Cary v. Kearsley* ⁽⁷⁾; *Spiers v. Browne*. ⁽⁸⁾ A new result is here attained by the defendant's exertion, and one which can in no way interfere with the plaintiffs' profit: *Wilkins v. Aiken* ⁽⁹⁾; *Bramwell v. Halcomb* ⁽¹⁰⁾; *Murray v. Bogue*. ⁽¹¹⁾ Moreover, each number of *Punch* must be looked at separately, and each act of alleged infringement stands alone. The nine acts complained of are rightly charged in separate counts of the declaration.

⁽¹⁾ 1 H. & M., 603; 32 L. J. (Ch.), 771.

⁽²⁾ 11 Sim., 31.

⁽³⁾ 11 Sim., 51.

⁽⁴⁾ 16 C. B., 459; 24, L. J. (C.P.), 175.

⁽⁵⁾ 5 C. & P., 219.

⁽⁶⁾ 6 Sim., 297.

⁽⁷⁾ 4 Esp., 168.

⁽⁸⁾ 6 W. R., 352.

⁽⁹⁾ 17 Ves., 422.

⁽¹⁰⁾ 3 My. & Cr., 787.

⁽¹¹⁾ 1 Drew. 353; 22 L. J., (Ch.), 457.

Looking at them then singly, it cannot be said that any of the pictures have been republished for the same purpose as that for which they were originally published. *Punch* is a satirical commentary on the topics of the day; the defendant's book is the life of one individual drawn not from *Punch* only, but from comic publications in all countries. The extracts from *Punch* are insignificant, and constitute nothing more than a reasonable reference to periodical literature. What has been done can cause no possible injury to the plaintiffs.

[PAGOT, B. The plaintiffs might themselves have collected all the cartoons relating to Napoleon III., or may still find it profitable to do so.]

Even if they should, the publication of a few of the pictures in a work compiled as the defendant's is, would not cause them any appreciable damage.

KELLY, C. B. I am of the opinion that the plaintiffs are entitled to retain their verdict. The questions raised are of interest and importance, but it is difficult to lay down any fixed principle with regard to them. No doubt the matter is, to a great extent, one of degree. It may be well that an author might copy into his book a portion of some books previously published, and yet that a jury might be justified in finding there had been no infringement of *copyright; whilst, on [5 the other hand, the copying might take place under such circumstances as clearly to amount to an infringement. Now, in considering the present case, let us first clear the way by inquiring whether there is any technical difficulty upon the construction of the statute which prevents the plaintiffs from maintaining this action. The statute protects any books or sheets of letterpress, and here the plaintiffs' publication consists of a sheet of letterpress, folded like a book, and made up partly of printed matter and partly — to use a generic term — of pictures, which are in many cases illustrated or explained by a small portion of letterpress underneath them. Nine of these pictures the defendant has copied, in some instances alone, in others with the addition of the printed words underneath them. If they have been so copied as to amount to a copy of a material part of the plaintiffs' publication, and the defendant has thus obtained a profit which would or might otherwise have been the plaintiffs', then there has been a piracy for which the defendant is responsible.

It is said that to copy a single picture, at all events, could not be an infringement of the plaintiffs' copyright, but it is impossible to lay that down as a general rule. I can easily conceive a case where such an act would not be piracy. For example,

where a picture is reproduced amongst a large collection published for an entirely differently object from that which the first publisher had in view. We must consider in such a case the intent of the copyist, and the nature of his work. To turn for a moment from pictures to printed matter, the illustration put during the argument by my Brother Bramwell will explain my meaning. A traveller publishes a book of travels about some distant country like China. Amongst other things he describes some mode of preparing food in use there. Then the compiler of a cookery book republishes the description. No one would say that that was piracy. So again an author publishes a history illustrated with woodcuts of the heads of kings, and another person writing another history of some other country finds occasion to copy one of these woodcuts. That again would not be a piracy. Yet, on the other hand, the copying of a single picture may, under some circumstances, be an infringement. For example, take the case of a work illustrated by one engraving of the likeness of some distinguished man where no other [6] likeness is extant. No one would have a right to copy that into a book upon any subject whatever, and a jury would in such a case rightly find that there had been an infringement of the copyright.

To return to the facts of the present case: the defendant has introduced nine pictures of the plaintiffs' into what I may call his comic life of Napoleon III. Is he by so doing applying to his own use and for his own profit what otherwise the plaintiffs might have turned, and possibly still may turn, to a profitable account? The pictures are of great merit, and no doubt were largely paid for, and by inserting these copies the defendant has unquestionably added to the value of his publication. Why should this not be an infringement? It was said by my Brother Parry, in his able argument, that the plaintiffs will never make such a use of these pictures as the defendant has made. But suppose, as my Brother Pigott suggested, that after the catastrophe which ended in the fall of Napoleon III., the proprietors of *Punch* had chosen to republish all their caricatures of him, or that even now they should choose to do so. One cannot help seeing that the defendants's publication might cause many, who would otherwise have bought, to refrain from buying such a work.

I need not refer at length to the authorities cited. The principle of them is, that where one man for his own profit puts into his work an essential part of another man's work, from which that other may still derive profit, or from which, but for the act of the first, he might have derived profit, there is evidence of a piracy upon which a jury should act. One of the

cases cited — *Bogue v. Houlston* ⁽¹⁾ — seems to me directly in point, and seems to have been considered by the vice chancellor as a clear case, for otherwise he would not have granted an injunction. On principle and authority, therefore, I think this rule should be discharged. My Brother Channell, who has been obliged to leave the court, concurs in this judgment.

BRAMWELL, B. I am of the same opinion, though not without some doubt — doubt which it is natural to feel in a case like this, which is on the border land between piracy and no piracy. But I think the plaintiffs are entitled to succeed. They are the *proprietors of a sheet of letterpress within the meaning of [7 the act of parliament. Now it is quite true, that when a man publishes anything he professes to add to the common stock of knowledge, and everybody may avail himself of what is published. This may be illustrated by the case put, of the compiler of a cookery book taking from some traveller's account of his travels a recipe for a new dish. But applying that principle here, it does not exonerate the defendant. If he had said, "I propose to illustrate my history by extracts from the satirists of the day," and had then gone on to quote to a reasonable extent the opinions, or even the very words of satirical writers, no one would call that piracy. Suppose, for instance, he had said, "At this period of his career Napoleon was unpopular and the subject of ridicule in England. This may be seen by examining the sort of pictures of him which appeared in *Punch*. Later on he became more popular, and the pictures published represented him more favorably." That could not have been complained of. Then the defendant would simply have been using the knowledge acquired from *Punch* for his own benefit, as he would have a right to do. But here he has done more. He has not availed himself of the knowledge acquired from *Punch*, but he has actually reproduced the very pictures published in *Punch*, and for the same purpose as they were originally published, namely, to excite the amusement of his readers. That seems to me to be an infringement of the plaintiffs' copyright.

PIGOTT, B. I am of the same opinion. The question is, whether a substantial part of the plaintiffs' publication has been appropriated, and I cannot doubt that it has. The pictures are a vital part of *Punch*; they are the result of labor, originality, and expenditure, and from their great merit are of permanent value. That being so, the defendant has reproduced nine pictures, and with the same object as the plaintiffs had in their

⁽¹⁾ 5 De G. & S., 267; 21 L. J. (Ch.), 470.

1872

Dawson v. Midland Railway Co.

original publication. That appears to me to amount to a piracy. The rule must therefore be discharged.

Rule discharged.

Attorneys for plaintiffs: *Chester, Urquhart, Bushby, & Mayhew.*
Attorneys for defendant: *Hughes & Son.*

[Law Reports, 8 Exchequer, 8.]

Nov. 7, 1872.

8] *DAWSON V. THE MIDLAND RAILWAY COMPANY.

Railway Company — Liability to fence — Owner and occupier of adjoining Land — Licensee of Occupier — 8 & 9 Vict. c. 20, s. 68.

The plaintiff hired of the occupier of some land adjoining the defendants' line of railway a stable for his horse. The horse was allowed to graze during the day on the land. One night it escaped from the stable on to the land, and thence, through a defective fence, on to the defendants' line, where it was run over and killed by a train. In an action for the value of the horse:

Held, that the plaintiff was entitled to the benefit of 8 & 9 Vict. c. 20, s. 68, whereby railway companies are bound to maintain sufficient fences for the protection of the cattle of the "owners or occupiers" of land adjoining their line, and that the defendants were therefore liable.

THIS was an action against the defendants for not fencing their line from adjoining land in accordance with their statutory obligation under 8 & 9 Vict. c. 20, s. 68, whereby a horse of the plaintiff strayed on to the defendants' line, and was killed by a passing train. At the trial before Blackburn, J., at the Warwick Summer Assizes, 1872, it was proved that the plaintiff had hired of the occupier of some land adjoining the defendants' line the use of a stable for his horse; and it was also arranged that the horse should be allowed to graze during the day in a field separated from the line by a fence. For this privilege no rent was paid. One night the horse escaped from the stable into the field, and thence strayed through a fence, which was admitted to be defective, on to the defendants' line, where it was run over and killed by a train. A verdict was, on proof of these facts, entered for the plaintiff for the value of the horse, with leave to move to enter it for the defendants if the court should think them under no liability towards the plaintiff to fence.

The 8 & 9 Vict. c. 20, s. 68, enacts that a railway company shall make and maintain "for the accommodation of the owners and occupiers of land adjoining the railway . . . sufficient fences for separating the land taken for the use of the railway

from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway."

**Field*, Q.C., moved for a rule in pursuance of the leave [9 reserved. The plaintiff was not the owner or occupier of the adjoining land. His horse, it is true, grazed by day in the field by the license of the occupier; but when the accident happened it was straying. It was not there at that time with the occupier's assent, and that being so, the statute is inapplicable: *Doraston v. Payne* (1); *Ricketts v. East and West India Docks Ry. Co.* (2).

KELLY, C.B. There should be no rule in this case. The plaintiff's horse was lawfully in the field, from which it escaped through defect of the defendants' fences. It is said that the statutory duty is only imposed on the defendants as far as regards "owners or occupiers" of the adjoining land. But here we must take it that the horse was upon the close with the licence of the occupier; and that being so, in my judgment the defendants are liable.

MARTIN, B., concurred.

BRAMWELL, B. I am of the same opinion. The statute appears to me to be for the benefit of all persons who are lawfully using adjoining land.

PIGOTT, B., concurred.

Rule refused.

Attorney for defendants: *Blenkinsop*.

(1) 2 H. BL. 527; 2 Sm. L. C., 6th ed., (2) 12 C. B., 160; 21 L. J. (C. P.), 201.
183.

[Law Reports, 8 Exchequer, 10.]

*GARNETT v. M'KEWAN (P.O.)

[10

Nov. 8, 1872.

Banker and Customer — Branch Establishments — Bankers' Right to combine Accounts — Notice.

The plaintiff having an account at the L. branch of the defendants' bank, which showed a balance to his credit exceeding 23*l.*, drew checks to that amount on that branch. At the same time he was indebted to the bank at their B branch in an amount which, having regard to his whole account, reduced his assets in the bank's hands to a few shillings only. The bank, without any notice to him, transferred the B. debt to the L. branch, and refused to pay the checks on presentment. There was no special contract between the parties that each account should be kept separate:

Held, that the bank was entitled at any time to combine the accounts, and to charge the L. account with the B. debt.

1872

Garnett v. M'Kewan.

DECLARATION against the defendant as public officer of the London and County Banking Company.

1st count, in the ordinary form, for not honoring the plaintiff's checks at the Leighton Buzzard branch of the bank.

2d count : That the company carried on business at Buckingham and Leighton Buzzard, and the plaintiff retained them as his bankers upon the terms (among others) that they should keep separate and distinct accounts of the plaintiff's transactions, and of the moneys received by them from the plaintiff at each place, and should not out of the moneys received by them at one place reimburse themselves any moneys advanced by them to the plaintiff at the other, without first giving him reasonable notice, and that they would from time to time out of the balance due to the plaintiff on either account, pay his checks presented at either place, irrespective of the state of the account at the other; that afterwards, and while there was a sufficient balance to the plaintiff's credit at Leighton Buzzard, and before any notice was given to him, the plaintiff drew three checks on the Leighton Buzzard branch bank, and all conditions were fulfilled, &c., yet the company did not pay the checks when presented.

Pleas (*inter alia*), 1. To 1st and 2d counts. Traverse of the retainer in these counts respectively alleged.

2. To 1st count: That at the times when the checks were respectively presented there was not sufficient means of the plaintiff in the hands of the company to pay them.

[11] *3. To 2d count: That at the times, &c., the checks and each of them exceeded the amount due to the plaintiff on the Leighton Buzzard account.

Issue.

At the trial before Bramwell, B., at the Middlesex sittings after Trinity Term, 1872, the following facts were proved:—The plaintiff, who was an auctioneer and cattle salesman, opened an account in the year 1866 at the Buckingham branch of the London and County Banking Company. In June, 1868, the account was overdrawn, and in August it was closed. There was then a balance against the plaintiff amounting to 42*l.* 15*s.* 11*d.* In December, 1871, the plaintiff having established two cattle sales in Bedfordshire, opened an account with the company at their Leighton Buzzard branch. On the 18th of January, 1872, this account on the pass book being made up, showed a balance to the plaintiff's credit of 48*l.* 2*s.* 5*d.* Between that day and the close of the month there were several transactions, and on the 31st the account showed a balance of 42*l.* 18*s.* 10*d.* in the plaintiff's favor. On that day three checks drawn by the plaintiff, and amounting to 23*l.* 3*s.*, were presented and dis-

honored; and on the day following he received a letter from the manager of the Leighton Buzzard branch, dated the 31st of January, telling him that on that day the company had charged to his account the 42*l.* 15*s.* 11*d.* due to the Buckingham branch.

The learned judge was of opinion that the company were, in the absence of any evidence of a special contract or course of dealing, justified in debiting the Leighton Buzzard account with the Buckingham debt, without giving the plaintiff notice. A verdict was accordingly entered for the defendant, with leave to move to enter a verdict for the plaintiff for 40*s.* and the amount of the dishonored checks, if the court should think that there was any evidence entitling him to maintain the action.

Graham (*Waddy* with him) moved accordingly. The company had no more right to debit the Leighton Buzzard account with the Buckingham debt than they would have had to debit it with a debt due to them from the plaintiff, not as bankers but in some other capacity. The two branches are perfectly distinct; and having regard to the mode in which the parties [12 had been dealing, the company ought at all events to have given the plaintiff a reasonable notice, before transferring his debt from Buckingham to Leighton Buzzard. In *Cumming v. Shand* (¹), where the usual course of dealing was for the banker to credit his customer against bills paid in, he was held liable for dishonoring a check without giving any notice of his discontinuing such dealing. This is an analogous case.

[He also cited *Hill v. Smith* (²), and *Shaw v. Dartnall*. (³)]

KELLY, C.B. I am clearly of opinion that there should be no rule. The question substantially raised by the pleadings is whether any money of the plaintiff's was in the hands of the London and County Bank, which they were bound to pay upon the presentment of his checks. The answer must depend upon whether they were indebted to that amount to the plaintiff. Now, in fact, they were not so indebted. If, therefore, they are liable in this action, it must be by virtue of some special contract or well recognized course of dealing.

It appears that the plaintiff was desirous of keeping an account with the London and County Bank, and it suited his convenience — and was for their profit no doubt — that he should deposit cash in their hands both at Leighton Buzzard and Buckingham, where they had establishments. And if the plaintiff had had a balance in his favor at both places he could of course have drawn at either to the extent of the balance there. But the fact was, that whilst he had a balance in his favor at Leighton Buzzard it was almost exactly equalled by a balance

(¹) 5 H. & N. 95; 29 L. J. (Ex.), 129. (²) 12 M. & W., 618. (³) 6 B. & C., 56.

against him at Buckingham. The defendant's bank, therefore, had scarcely a shilling of his money, and I cannot see why they were bound to honor his check at Leighton Buzzard just because there was a balance at that branch in his favor. It is contended that the branches are quite distinct, and the defendant's bank have no more right to set off at the Leighton Buzzard branch a debt due to them as bankers at Buckingham than they would have to debit a debt due to them in some other capacity — as [13] brewers, for example, against the plaintiff's *account. It must be remembered, however, that the plaintiff might have ordered a transfer of his assets from the one branch to the other, and the defendant's bank, on the other hand, must have a corresponding right. In general it might be proper or considerate to give a notice to that effect, but there is no legal obligation on the bankers to do so, arising either from express contract or the course of dealing between the parties. The customer must be taken to know the state of each account, and if the balance on the whole is against him or does not equal the checks he draws, he has no right to expect those checks to be cashed. We all know what the actual practice of bankers is where there are branches. In such cases the managers of each branch are in the habit of communicating with each other, and honor checks of the customer according to the state of his general account. But there is certainly no usage according to which the customer is entitled to expect his checks to be honored at one branch where he happens to have a balance to his credit, when at the same time that balance is counterbalanced by a debit against him at another branch.

With respect to the cases cited, they are distinguishable. In *Hill v. Smith* ⁽¹⁾ the customer sent money to the bank for the specific purpose of meeting a particular bill, and that money no doubt the bankers, having accepted it for that purpose, could not set off against the general account. In the other case cited, *Cumming v. Shand* ⁽²⁾, a special contract was established, and the defendant was on that account held not to be entitled to refuse to honor the plaintiff's checks. Here there was no special contract and no usage proved, and in the absence of either, the mere fact of there being two branch establishments is not enough to entitle the plaintiff to recover. The rule must therefore be refused.

MARTIN, B. I am of the same opinion. The question is really one rather of fact than of law. The relation between banker and customer is that of debtor and creditor with a superadded obligation on the part of the banker to honor the

(¹) 13 M. & W., 618.

(²) 5 H. & N., 95; 29 L. J. (Ex.), 129.

customer's checks so long as there are any assets of his in the banker's hands. So it was expressed in the judgment of the court in *Pott v. Clegg* ⁽¹⁾. But the *mere existence of an [14 apparent balance, if there is no real balance, is not enough to render the bank liable to pay a check at the branch where the apparent balance is. There was no evidence that in this case the bankers undertook to cash checks at one branch when the whole accounts showed that the customer had no sufficient balance. No special contract, nor any usage or course of dealing to that effect was proved.

FIGOTT, B. I also think the rule should be refused. Where there are branch banks the same relation between banker and customer exists, in the absence of any special contract, as in the case where there is one establishment only. There is no duty on the part of the bank to keep the accounts separate. No one would say that a banker might set off against his customer's account a debt due to him from his customer in another capacity, a private debt, for example, or a debt due to him as carrying on some distinct business. Nor has a banker any right to confound two accounts lodged with him by one person in two different capacities. He would have no right to blend a personal and a trust account. But here there is nothing to prevent the banker from taking into account the state of the plaintiff's balance as a whole; and upon such account being taken, it appeared that the plaintiff had no sufficient assets to meet the checks presented. The banker was therefore justified in dishonoring them.

BRAMWELL, B. I thought the defendant entitled to the verdict at the trial, and I still think so; though my opinion is not a very confident one. My doubt arises thus: The money is paid to the customer's account at a particular place, and except at that place he cannot call upon the bank to pay, although he may happen to have a balance at another branch establishment. Is not the obligation correlative? The bank is not liable to be called on to pay at one branch just because there is a balance at another. Why, then, may the bank without notice debit the customer's account at one branch with his deficiency at another? The question is one of mixed law and fact. It is admitted that in some cases the bank could not debit the customer with a debt due to them; for example, a debt due to the bank as carrying on a different business, as that of brewers. Nor, again would they have *any right to blend two accounts [15 kept by one person with them in different characters, as a personal and a trust account. But here there was nothing except

(1) 16 M. & W., at p. 828.

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Philps v. Hornstedt.

the fact that there were two branch establishments. Nothing was said as to their being separate, and nothing should be implied. If indeed it was understood and agreed that the branches should be kept separate, then the plaintiff is right, but not otherwise. And with regard to the correlative rights of the parties, it must be remembered that if a customer might draw anywhere where he had a balance, no matter what the real debit against him might be, there would be a real hardship on bankers and a difficulty in their conducting business. But to limit his drawing to the amount of his total actual balance is no hardship on him, for he always knows, or can know if he likes, the state of his account as a whole. In practice, bankers do constantly allow overdrawing at a particular branch, because they know they may debit the customer with his balance at some other branch. It may be convenient and proper for them to give the customer notice of their intention to do so, but there is no legal obligation upon them to give such notice.

I think, therefore, that the customer has no claim, for he is indebted to the bank on his whole account in such an amount as to reduce his assets to almost nothing. There is no duty, in my opinion, apart from usage or contract, on the part of the banker to honor checks at one branch because the customer has a credit there, if at another branch there is a countervailing debit. I agree, therefore, that the rule must be refused.

Rule refused.

Attorney for plaintiff: *Rogers.*

When money is deposited in a bank, to the credit of the depositor generally and is not placed or received as a *special deposit* the bank does not hold the money as a bailee but the relation of debtor and creditor is created and the money may be applied by the bank

to the payment of any demand it may have against the depositor. *Commercial Bank v. Hughes*, 17 Wend., 94; *Demon v. Boylston Bank*, 5 Cush., 194; *Re European Bank*, 21 Weekly, Rep., 45; L. R., 8 Chy. App., 41 *post*, page.

[Law Reports, 8 Exchequer, 26.]

Nov. 25, 1871.

26]

*PHILPS, Trustee v. HORNSTEDT.

Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, subs. 2 — Fraudulent Conveyance.

The defendant received from M., a member of a trading firm, a bill of lading for brandy, for the purpose of landing and warehousing it, which he did, entering the brandy (at M.'s request) in his own name, and paying charges amounting to 47*l.* Afterwards, and whilst he still had the bill of lading in his possession, an acceptance which had been given by the firm to the defendant for the hire of a ship falling due, and the firm not being able to meet it, the defendant consented

to take M.'s acceptance at seven days for a balance of account, including the hire and the 47*l.*, upon receiving M.'s authority to sell the brandy, if the bill were not met. This acceptance not being met, the defendant sold the brandy. The firm were afterwards adjudicated bankrupts, and the trustee sued the defendant in trover for the value of the brandy. The transaction was *bonâ fide*, but the brandy formed in fact the whole property of the firm.

Held, that the transaction under which the defendant obtained power to sell the brandy was not a "fraudulent conveyance, gift, delivery, or transfer," within the meaning of the Bankruptcy Act, 1869, s. 6, subs. 2.

ACTION brought by the trustee in bankruptcy of the estate of McFarlane & Co. (a firm consisting of McFarlane, Henry, and Vernon) to recover the value of 600 cases of Bordeaux brandy. The first count stated a conversion by the defendant before the bankruptcy of goods of the bankrupt; the second count stated a conversion after the bankruptcy of goods of the plaintiff as trustee; the third count was for money payable to the bankrupt before the bankruptcy, for money had and received, and on accounts stated; and the fourth count for money payable to the trustee, for money had and received, and on accounts stated after the bankruptcy. *The defendant pleaded to the first two [27 counts, respectively, not guilty, and denial of property; and to the third and fourth counts, never indebted; and to the third count, set off.

The cause was tried before Mr. Hawkins, Q.C., at the Guildford Summer Assizes, 1872.

From the evidence then given it appeared that about the 17th of August a bill of lading for 600 cases of brandy was handed by McFarlane to the defendant for the purpose of landing and warehousing the goods, which the defendant did, warehousing them (at McFarlane's request) in his own name, and paying charges amounting to 47*l.*; that on the 29th of August a bill for 245*l.*, given by the bankrupts for the hire of a ship called the *Iron Era*, of which the defendant was managing owner, and which was used by the bankrupts for carrying on their trade, falling due ⁽¹⁾, an interview took place between McFarlane and the defendant, at which McFarlane asked the defendant to take his acceptance for the amount at fourteen days; that defendant having to meet a bill before the expiration of that time, declined this offer, and McFarlane then said, "You are perfectly secure; here are 600 cases of brandy, which are worth a great deal more than you want from me;" that defendant then said that, with the consent of others who were interested, he would give him seven days' credit; that on the following day he again saw McFarlane and Henry in company with a Mr. Bew; that McFarlane then said he had money coming from France, and that the proposed bill at seven days would be met; and in answer to a

(1) It was not clear upon the evidence whether the bill had actually matured or was just falling due.

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question by Mr. Bew, "whether he was solvent," he replied that "he had brought a great deal of money from America, and there was plenty more where that came from, and that he could not understand why defendant should make any question as he gave him the brandy as security;" that, after some discussion as to the value of the brandy, the defendant consented to take McFarlane's bill, saying that "he hoped the bill would be met, as he would be in a difficulty if he had to realize the brandy at the last moment, and that he would have to realize it at whatever it fetched if the bill were not met;" to which McFarlane replied, "You are at liberty to do whatever you like with the 28] brandy; that Mr. McFarlane *then gave defendant his acceptance at seven days for 302*l.*, the balance of an account then stated, and which included the amount due to defendant for landing and warehousing; that the bill was not met; that the defendant accordingly sold the brandy to Child & Co. for 175*l.*, from whom he afterwards repurchased it about the end of October for 225*l.*, and resold it for 357*l.*; that on the 12th of September a bankruptcy petition was filed against McFarlane & Co., founded on an act of bankruptcy committed on the 1st of September, and on the 12th of October the firm were adjudicated bankrupts.

The jury found that the transaction on the 30th of August was a *bonâ fide* arrangement, honestly entered into and honestly carried out, and they also found that the bankrupts had not on that day any other property besides the 600 cases of brandy.

The learned commissioner thereupon directed the verdict to be entered for the defendant, with leave to the plaintiff to move to enter the verdict for him for 400*l.*, the sum found by the jury to be the value of the brandy.

A rule having been obtained accordingly, or for a new trial on the ground that the learned commisssoner should have told the jury that the plaintiff was entitled to the verdict.

Garth, Q.C., and Grantham, showed cause. This was neither a fraudulent preference nor a fraudulent conveyance. The finding of the jury disposes of the first, and the admitted facts of the second. The defendant clearly had the brandy in his possession under a lien for 47*l.*, and all that he obtained by the transaction of the 30th of August was a right to sell. Such a transaction is not a "conveyance, gift, delivery, or transfer;" it is, therefore, not within the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, subs. 2. But if it were included in those words, it was not fraudulent even in a technical sense, the debtor not being deprived by it of the possession of his goods, and neither party at the time supposing it to be the whole of the debtor's property.

Prentice Q.C., and *R. V. Williams*, in support of the rule. The question of whether an act is a fraudulent conveyance within the meaning of the bankruptcy law does not depend on whether the property transferred is known by the creditor to be the whole of *the debtor's property, but on whether it is [29 so in fact. So with a fraudulent preference, where an intention to give a preference to the creditor must exist on the part of the debtor, this may be unknown to the creditor; *a fortiori* it is so with a fraudulent conveyance, where no design of delaying or defeating creditors need exist in fact, and it is sufficient if that is its necessary consequence. The cases of *Ex parte Hawker* (1) and *In re Wood* (2) show that the law as to fraudulent conveyance is not altered by the new act.

[*BRAMWELL*, B. There is no doubt about the soundness of those decisions; but is this a "conveyance, gift, delivery, or transfer" ?]

It is. Even assuming the defendant had a lien (which is doubtful), he had no right to sell; and giving him that right was equivalent to transferring the property to him. It was, moreover, giving him possession in a different right — that is, with the right of holding and of selling, not only as against the 47l., but as against the pre-existing debt for hire; and assuming that the mere super-addition of the power of sale to his original lien would not have made the act an act of bankruptcy, the addition of this further charge did so. *Woodhouse v. Murry* (3) shows that the fact that the debtor is already out of possession will not validate as against creditors a transfer of his whole property.

MARTIN, B. I think this rule should be discharged, and on two grounds. First, I think the defendant had a lien on the brandy in respect of money paid by him for its clearance, and until tender of the amount of that lien was made, the trustee was not in a position to sue.

Secondly, I think this was not an act of bankruptcy. The case of *In re Wood* (2) was a perfectly clear one; there was a conveyance properly so called, by which the debtor intentionally conveyed away to his creditor all his property. But if a transaction takes place in which there is no such intention on either side, but which afterwards turns out to have the effect of transferring the whole of the debtor's property, that is not a conveyance or transfer within the meaning of the statute. Here there was no conveyance, *transfer, gift, or delivery; there was [30 merely a power given to the creditor to hold property of which

(1) Law Rep., 7 Ch., 214.

(2) Law Rep., 7 Ch., 802.

(3) Law Rep., 4 Q. B., 27.

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he already had, and was entitled to retain, the possession as against a debt due to him, neither party supposing it to be the whole of the debtor's property. Such a transaction is not within the terms of the act.

BRAMWELL, B. I think also this rule should be discharged. It may be that the defendant's lien for 47*l.* would not alone have given him a defence; for if he had only a lien, he had no right to sell against the charge, and his doing so would be a conversion. But I mention the lien because it gave the defendant a right to possession; and that being so, what took place afterwards was not the giving of any further possessory right, but only giving the defendant a right to sell and pay himself out of the proceeds. What so took place cannot be either a "conveyance, gift, delivery, or transfer." It may be that if the case had been present to the minds of the legislature, they would have included it; the words "charged upon" would have been apt words for that purpose. They have not used any such words, and the words they have used do not comprehend the case. But I am not sure that the legislature did not have in their contemplation, and intentionally exclude such cases, that is to say, ordinary mercantile transactions, where, without any fraud, a creditor having in his possession goods belonging to his debtor, and subject to a lien for the debt, the owner requests him to sell the goods for their joint benefit, to pay himself out of the proceeds the amount due, and to hand over the balance to the owner. I think it was never intended that such a transaction should constitute an act of bankruptcy if it afterwards turned out that those goods were the whole property of the debtor.

But I further doubt whether, even if the act had used the words "charged upon," a transaction of this sort, though relating to the whole property of the bankrupt, would have been fraudulent within the meaning of the act. With what reason can it be said that there was here an assignment or charge without a present equivalent? The goods were already in the possession of the defendant, and subject to his lien, so that the bankrupt could not regain possession of them without paying the sum due. The bankrupt was also in diff-
31] culties about a bill in the defendant's *hands, which was just falling due, and the dishonor of which would be disastrous to his credit, and would besides cause the defendant to withdraw from him the ship, on the possession of which the carrying on of his business depended. Under these circumstances he makes the arrangement of which the defendant has taken advantage; that arrangement is not, in my opinion, "fraudulent" within the meaning of the act (an expression always unfortunate when

actual fraud is not meant), even if it were otherwise within its words.

CLEASBY, B. In this case an authority to sell was given by the bankrupt, in whom the whole property in the goods was vested, to the defendant, in whose possession they were, subject to a lien. Suppose all he had given was an authority to sell at the end of a week, without any further charge; could it have been said that this privilege, which the defendant did not possess before by virtue of his lien, was a "conveyance, gift, delivery, or transfer"? Clearly not. That is an answer to the first objection.

As to the other question, whether giving a right to sell for the further claim makes the transaction fraudulent within the act, no authority has been referred to which shows it to be so; and we should be extending the construction given to the word "fraudulent" if we were to apply that term to such a case as the present. I think we ought not to do so; and the rule must therefore be discharged.

Rule discharged.

Attorneys for plaintiff: *Evans, Laing, & Eagles.*

Attorney for defendant: *Handson.*

[Law Reports, 8 Exchequer, 82.,

Nov. 30, 1872.

[IN THE EXCHEQUER CHAMBER.]

MOUFLET v. COLE.

[32

Measurement of Distance—"As the Crow flies," or by nearest mode of practicable Access—Covenant not to carry on Trade within a given Distance.

The defendant covenanted with the plaintiff not to carry on the business of a publican within half a mile of the plaintiff's premises. He afterwards carried on business within half a mile if the distance were measured in a straight line, "as the crow flies," but not within half a mile if the distance were measured by the nearest mode of practicable access:

Held (affirming the judgment of the court below), that there had been a breach of the covenant.

APPEAL from the decision of the Court of Exchequer discharging a rule to enter a verdict for the defendant ⁽¹⁾.

The case was argued on the 21st and 22d of June, 1872 (before Willes ⁽²⁾), Byles, Blackburn, Keating. Lush, and Brett,

*Affirming 1 Eng. Rep., 177, see note, page 191.

⁽¹⁾ Law Rep. 7 Ex., 70.

⁽²⁾ Willes, J., died between the argument and judgment

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JJ.), by *Garth, Q.C. (A. L. Smith with him)*, for the defendant, and by *Parry, Serjt. (F. Turner with him)*, for the plaintiff.

Cur. adv. vult.

Nov. 30. The judgment of the court (Byles, Blackburn, Keating, Lush, and Brett, JJ.) was delivered by

BLACKBURN, J. In this case the defendant by deed sold to the plaintiff the public house called the "Lord Holland" and the goodwill of the business, and the defendant in the deed covenanted that he should not be in any way concerned in a public house "within the distance of one half of a mile of the said premises called the 'Lord Holland'" during the plaintiff's occupancy.

At the trial before Martin, B., it appeared that the defendant did occupy a public house so near the 'Lord Holland' as to make it a matter of controversy whether it was within the half mile or not. The judge was of opinion that the distance was to be measured "as the crow flies," and the verdict was entered for the plaintiff subject to the distance being measured, "such measurement to be made upon such principle as should be laid 33] down by the court *upon its final decision as to what was the true construction of the said covenant, leave being granted to the defendant to enter the verdict for him in the event of its being found by the said measurement, made upon the principle by the court laid down, that the said public houses are more than half a mile apart." The majority of the Court of Exchequer were of opinion that "the true construction of the language used is that a circle of half a mile radius is to be drawn round the 'Lord Holland,' and that if the defendant carries on the business of a publican within this space, he has broken his covenant." Cleasby, B., was of opinion that the distance was to be measured as a travelled distance, and to be measured "by the nearest available mode of access between the two houses."

There is a difference, though not generally of any consequence, between the distance as it would appear if measured on a map, without regard either to the curvature of the earth or the differences of level (if any such exist on the spot), and the distance in an actual straight line drawn from the one point to the other. The majority of the court below have not noticed this; but, subject to some remarks which we shall afterwards make on this, we agree in their judgment.

We agree with what Parke, J., says in *Leigh v. Hind* (¹), that the parties to such an agreement do not contemplate the actual distance which a customer would have to traverse in going from one house to the other. No doubt their first object was

(¹) 9 B. & C., at p. 779.

to have protection for the custom of the purchased house by securing that the seller should not set up business so near to it as to affect the custom, and that would involve the consideration of how far the customers would have to travel; but as a covenant to that effect would obviously lead to constant litigation, they wish those who prepare their contract to lay down a fixed rule that will admit of no dispute. The words which they have used are to be construed in their ordinary sense, bearing in mind that such is their object. That object is best effectuated by measurement on the map; and we think the matter is now concluded by the balance of authority in favor of that construction. In *Woods v. Denetti* ⁽¹⁾ Lord Ellenborough, in 1817, at *nisi prius*, laid down a rule *contrary to this. In *Leigh v. [34 Hind* ⁽²⁾, where there were two practicable modes of going between the houses, which were both less than the stipulated distance, and a third which was greater, the whole Court of King's Bench thought the contract broken; but Lord Tenterden and Littledale, J., assigned as their reason that the distance should be measured by the nearest mode of access, and Parke, J., that it should be "as the crow flies," which, of course, was shorter than either. At the time the weight of authority was probably in favor of the defendant's construction.

But then arose a series of cases: *Reg. v. Saffron Walden* ⁽³⁾ decided in the year 1846; *Stokes v. Grissell* ⁽⁴⁾, in 1854; *Lake v. Butler* ⁽⁵⁾, in 1855; *Jewel v. Stead* ⁽⁶⁾ in 1856; and *Duignan v. Walker* ⁽⁷⁾ in 1857, which all adopted the other rule. It is true that most of those cases were on the construction of statutes, not of contracts. We do not, however, think that there is any sound distinction between statutes and contracts in this respect. In each the object is to substitute a certain distance, capable of easy determination, for a reasonable distance, which being uncertain, would be a trap for litigation. And the object of the draftsman who prepares either an act of parliament or a contract where it is necessary to specify a distance, ought to be to use words that give a fixed and easily ascertainable guide.

In *Lake v. Butler* ⁽⁸⁾, Crompton, J., says: "If this question were quite new, the convenience would be all in favor of construing the distance as that measured in a straight line, and the words would be, to say the least, capable of bearing that construction. In common language, if you ask how far it is from one place to another, the answer often is, 'Do you mean by the road or by the fields, or as the crow flies?' But the recent au-

⁽¹⁾ 2 Stark. N. P., 89.

⁽²⁾ 9 B. & C., 774.

⁽³⁾ 9 Q. B., 76.

⁽⁴⁾ 14 C. B., 678; 28 L. J. (C.P.), 141.

⁽⁵⁾ 5 E. & B., at p. 99; 24 L. J. (Q.B.) 273.

⁽⁶⁾ 6 E. & B., 350; 25 L. J. (Q.B.), 294.

⁽⁷⁾ Joh., 446; 28 L. J. (Ch.), 867.

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thorities being all in favor of this construction, and the decision in *Reg. v. Saffron Walden* ⁽¹⁾ being precisely in point, we ought to adhere to it at any rate, so that the legislature may know how such general words in an act will be construed, and use them in that sense."

35] *Since that case there has been a further decision in the Queen's Bench of *Jewel v. Stead* ⁽²⁾: and a decision of Wood, V.C., in *Duignan v. Walker* ⁽³⁾, where he applies the same rule to a contract as we think should be applied. We, therefore, adopt as our own the judgment of Crompton, J., only slightly altering the last sentence. The recent authorities being all in favor of this construction, and the decision in *Duignan v. Walker* ⁽³⁾ being precisely in point, we ought to adhere to it, "at any rate so that parties framing a contract may know how such words in a contract will be construed, and use them accordingly."

It is to be observed, that the phrase used in the judgment of the majority of the court below is, that "a circle of half a mile radius is to be drawn round the 'Lord Holland';" and Crompton, J., in the passage cited, uses the phrase "in a straight line." This, we think, would be understood by any one to mean that the circle is to be drawn and the line measured on a map; and this is, we think, the true meaning of the contract. It is a very simple matter to take the Ordnance map, and with a pair of compasses measure the distance between any two points, and then by the scale ascertain what that distance is. And we think this is what, in ordinary language, is meant when people speak of a circle round a particular point. But inasmuch as, in laying down a map it is treated as if the surface was projected on a plane, whilst in reality the surface of the earth is part of a very large sphere, and the surface varies in its level, this distance measured in an actual straight line between the points is not precisely the same as that measured on a map, or, as the legislature have expressed it in 6 & 7 Vict. c. 18, "the distance measured in a straight line on the horizontal plane."

In so short a distance as a half a mile the difference arising from the curvature of the earth would not be more than a fraction of an inch, and may clearly be neglected as insensible. But that arising from the inequalities of the surface, though never great, may be perceptible. If, for instance, the distance measured on the map between two places was half a mile, and there was a difference in level of 130 feet, the actual distance in a straight line would be half a mile and a yard. But to as-

(1) 9 Q.B., 76.

(2) 6 E. & B. 850; 25 L.J. (Q.B.), 294.

(3) Joh., 446; 28 L. J. (Ch.), 867.

think that people, in speaking of the distance round a point, do contemplate such minute accuracy. We think, therefore, that the distance should be measured on the map. It may be observed, that where in any case it is desired to adopt another rule, words can easily be used to express it, as was done in *Atkyns v. Kinnier* ⁽¹⁾.

One other point is to be disposed of. We think, in measuring the distance it should be taken from the nearest point of the one house to the nearest point of the other, without regard to where the doors are situated.

The judgment must therefore be affirmed.

Judgment affirmed. ⁽²⁾.

Attorneys for plaintiff: *Stileman & Neate*.

Attorneys for defendant: *Shum & Crossman*.

⁽¹⁾ 4 Ex., 776; 10 L. J. (Ex.), 133.

⁽²⁾ Byles, J., concurred, solely in deference to authority.

[Law Reports, 8 Exchequer, 40.]

Feb. 8, *1872.

***MORRISON v. the UNIVERSAL MARINE INSURANCE COMPANY. [40**

Marine Insurance — Concealment — Knowledge of Underwriter — Election — Delivering out Policy.

The plaintiff's insurance broker effected an insurance with the defendants on the chartered freight of the plaintiff's ship *Cambria* without disclosing to the defendants certain information in his possession, which it was material that they should know (October 10). In so doing he acted in good faith, supposing, from inquiries that he had made, that the information was incorrect. After initialing the slip, but before executing the policy, the defendants (October 13) became possessed of the information which the broker had not disclosed; and they afterwards executed and delivered out the policy without any protest or any notice that they would treat it as void (October 14 or 15). Upon receiving news of the loss of the vessel they gave notice to the plaintiff that they did not consider the policy binding on them (October 20). On the trial of an action upon the policy the learned judge directed the jury (in substance) that the defendants were bound to make their election within a reasonable time after they became aware of the concealment, and left it to them, without expressing any opinion, whether the defendants had elected to go on with the policy:

Held (Cleasby, B., dissenting), a misdirection, on the ground (by Martin, B.), that if the conduct of the defendants in delivering out the policy would induce the plaintiff to suppose that he had a valid policy, they were estopped from denying it; (by Bramwell, B.), that delivering out the policy with knowledge of the concealment was *prima facie* an election, and threw on the defendants the burden of showing circumstances to explain it.

The information not disclosed by the broker had appeared in *Lloyd's List*, which is a daily newspaper containing hundreds of entries relating to shipping in all parts of the world, and circulating among shipowners, underwriters, and insurance brokers; the defendants were in fact subscribers to this newspaper:

Held, that the broker was not entitled to assume a knowledge by the underwriters of the contents of *Lloyd's List*.

* Decided at the sittings after Hilary Term, 1872.

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Morrison v. Universal Marine Insurance Company.

THIS was an action brought on a policy of insurance for,500*l*. on the chartered freight of the ship *Cambria* (which was totally lost), effected with the defendants by Previté & Greig as brokers on behalf of the plaintiff.

The defendants pleaded (1) fraud, (2) misrepresentation of a material fact, and (3) concealment of material facts.

The cause was tried before Blackburn, J., at the Liverpool Winter Assizes, 1871, and the following facts were proved:

The plaintiff is a merchant trading at Liverpool, and the defendants are an insurance company carrying on business in London.

41] *The plaintiff was sole owner of the ship *Cambria*, which sailed from Bahia on the 18th of August, 1870, for New Orleans, under instructions to call at the South West Pass for orders.

The South West Pass is one of the passes into the Mississippi; it is at some distance below New Orleans, and is a place of call for orders for vessels going to load at the cotton ports of the Gulf of Mexico.

On the 9th of September, 1870, the plaintiff entered into a charterparty with McMahon & Co., of Galveston, merchants, by which the *Cambria* was to proceed to the South West Pass for charterer's orders, and thence to Galveston in Texas, New Orleans, or Mobile, and there take a full cargo of cotton for Liverpool.

On the 3d of October the *Cambria* arrived at the South West Pass, where the master received orders from the charterers to proceed to Galveston, and on the next day he sailed for that port. On the 6th of October the vessel arrived off the harbor of Galveston, and got ashore on the North Breakers off the entrance of the harbor, and was there totally lost.

On the same day (October 6) the master sent to the plaintiff from Galveston the following telegram: "Ship *Cambria* ashore near here, full of water, lost." The telegram was received at Liverpool post office at 5.30 P.M., on the 7th of October; but the plaintiff denied having ever received it, and on this issue the jury found in his favor.

On the 6th of October E. P. Hunt, the agent at Galveston of Lloyd's Liverpool and London Underwriters' Association, and of the Marine Board of Underwriters of New Orleans, sent the following telegram to the agent for Lloyd's at New York: "Ship *Cambria*, Owen, master, of Jersey, from Bahia, S. America, ballast, ashore, North Breakers, probably lost."

On the 7th of October a telegram was received by Lloyd's, London, from the agent for Lloyd's at New York, in consequence of which the following announcement was made the next day in *Lloyd's List*: "New York, 6th October.—The *Cambria*

(probably Cameo), from New Orleans, grounded on North Breaker."

On receipt of this telegram the following telegram was forwarded by Lloyd's to Liverpool, and was entered on the loss-book at the rooms of the Underwriters' Association at Liverpool *at thirty-nine minutes past noon on the 7th of October: [42 "Cambria, qy. Callao, from New Orleans, aground North Breaker."

The plaintiff is not a member of or a subscriber to the underwriters' rooms, to which only subscribers or members are admitted.

After making the above entry in the loss book, Dick, the secretary to the Liverpool Lloyd's Association, searched *Lloyd's List*, and about an hour after making the entry, he added at the foot of it the following words in parenthesis: "(Memorandum, Cambria, Owen, 1177 tons, left Bahia 18 Aug. for New Orleans)."

On the same evening, at the hour for closing the rooms to subscribers, the secretary, according to his usual custom, sent for publication to the *Liverpool Mercury* a copy of the despatch first received from Lloyd's, but added the word "Qy." after the words "New Orleans;" so that the publication among the shipping news of the *Mercury* of Saturday, 8th of October, was in these words: "Cambria, qy. Callao, from New Orleans, qy. aground North Breakers."

Not being able to find anything about a ship named Callao, he had telegraphed the same day to the London Lloyd's, to inquire into the meaning of the words "Qy. Callao," and received at 5.30 p.m., after the rooms were closed, the following answer: "Cameo, from New Orleans, is supposed to be the name of the ship aground on the North Breaker."

After receiving from Lloyd's, London, the answer above set forth, the secretary searched *Lloyd's List*, in order to ascertain something about the ship Cameo, and then made the following entry in the loss book: "The vessel on the North Breaker reported yesterday as the Cambria, is stated to be the Cameo, from New Orleans. Memorandum: The ship Cameo, from Antwerp, arrived at New Orleans on the 26th September.

This entry was also sent to the *Mercury* on the morning of Saturday, the 8th, and was published in that paper on Monday, the 10th of October.

The secretary stated, on cross-examination, that he added the above memorandum as being, in his opinion, tantamount to a statement that the ship on the North Breakers could not be the Cameo, "because," he said, "the Camco having arrived on the 26th of September, she could not have got her cargo discharged

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43] and loaded, *and come out again to be lost on the 6th." He did not, however, in any way communicate with Lloyd's in London that he had come to this conclusion.

On Saturday, the 8th of October, the plaintiff, who, up to that time, had no insurance on the *Cambria* or her freight, wrote from Liverpool orders to Messrs. Previté and Greig, of London, insurance brokers, to effect insurance for 5000*l.* on the ship, and 5000*l.* on chartered freight.

The plaintiff bought a copy of the *Liverpool Mercury* of the 8th of October, but he swore that he did not see the entry above mentioned until his attention was called to it at his own house late in that afternoon, after the letter of the 8th had been posted. The plaintiff also bought a copy of the *Liverpool Mercury* of the 10th of October, on his way to his office, where he went earlier than usual, in consequence of the announcement in the *Mercury* of the 8th.

Immediately on his arrival at his office, he sent to his brokers the following telegram: "Since writing Saturday, paragraph in *Mercury*, '*Cambria*, quære *Cameo*, from New Orleans, aground on North Breaker.' To day's *Mercury* says: 'The vessel on the North Breaker, reported yesterday as the *Cambria*, is stated to be the *Cameo*, from New Orleans.' Can you find out at Lloyd's? let me know by wire before acting." And later, on the same day, he wrote to his brokers a letter in which, after quoting the above telegram he said, "It is our impression that it cannot be the *Cambria*, or our captain would certainly have telegraphed us, and we have received none. If it is not the *Cambria*, should like the insurance done on good terms, as she is rather long on the voyage. We have sent you all the particulars we have received, and must leave you to act as best for our interest. She may have been detained on the line, but have not seen her spoken, which makes us uneasy. All we know is, the above extracts from *Liverpool Mercury* newspaper, sent you at once by telegram, and are waiting any information you can give us about her from Lloyd's. Your telegram to hand, as under, 'Vessel on North Breakers appears to be *Cameo*, and not *Cambria*,' to which we replied by wire—Your telegram received, and a great relief; nevertheless, have been so frightened that we wish insurance done on the best terms. We will not run a yard if not insured any more."

44] *No information was given to the underwriters of the memorandum published in the *Liverpool Mercury* on the 10th of October at the end of the telegram.

The letter of the plaintiff of the 8th of October, with the captain's letter from Bahia, announcing the *Cambria*'s sailing, and the charterparty, and the plaintiff's telegram of the 10th of

October, were received together by the brokers on reaching their office on the morning of October the 10th, and Previté immediately went to Lloyd's for the purpose of searching the books, and endeavoring to ascertain whether the vessel reported to be lost was the Cambria or the Cameo.

By referring to the index books of Lloyd's, which contain an index to the entries in *Lloyd's List*, Previté discovered the announcement published there on the 8th of October, as above stated.

Lloyd's List is a daily shipping gazette, containing several hundreds of entries giving the shipping news from all parts of the world. These gazettes are received every morning by underwriters, and were actually received by the defendants.

Previté also searched at Lloyd's for information about the ship Cameo, and found that there was news of her arrival at New Orleans on the 26th of September; and not finding any news of the Cambria at New Orleans, or at the South West Pass, as was to be expected if she had arrived there, he concluded that the vessel reported to be ashore on the breakers must be the Cameo, and not the Cambria.

Previté having come to this conclusion, applied on behalf of the plaintiff to various underwriters on the 10th, 11th, and 12th of October for insurance. He took in his hand, the captain's letter and the charterparty, and stated to the underwriters when and from where the vessel sailed, and what the voyage was. Beyond this he gave no information, to the underwriters, being convinced, as he said on cross examination, that the vessel ashore was the Cameo and not the Cambria. It was conceded that he acted throughout in good faith.

On the 10th of October he effected with underwriters, other than the defendants, insurance on the freight for 1350/., at a premium of six guineas per cent.; and on the same day he exhibited to Mr. Fisk, the defendants' underwriter, the slip initialed at a *premium of six guineas per cent., and proposed that [45 the defendants' company should take a line on the freight at the same rate. Fisk, after hearing from Previté that insurance on the vessel was also desired, declined to insure the ship at all, but offered to take a line on the freight at eight guineas premium.

On the 11th of October, Previté effected further insurance on behalf of the plaintiff on the freight at eight guineas per cent.

On the 12th of October, he proposed to Mr. Pritchett, the defendant's assistant underwriter (Mr. Fisk being then away), to take a line on the freight at 8 guineas per cent., stating that Fisk had given him a quotation at that rate; and Pritchett,

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without asking for or receiving any information from the broker beyond the date of the sailing of the vessel, and the facts stated in the slip hereinafter mentioned, initialed the slip on behalf of the defendants for 500*l.* on the chartered freight.

The same day, and soon after having initialed the slip, Pritchett went to Lloyd's rooms, and there saw in the loss book (which lay open on the stand where it is always kept open for the information of all visitors to the room) the above mentioned announcement from Lloyd's agent at New York. This entry should, in ordinary course, have been made in the loss book on the same day as it appeared in *Lloyd's List*, viz., on the 8th of October, but it had not, in fact, been entered till that morning.

Immediately on reading this entry, Pritchett, seeing Previté in the room, accosted him and said, pointing to the loss book, "This looks uncommonly like the *Cambria*, which I have just written for you." Previté replied (according to Pritchett's evidence) "I know all about this; this is the *Cameo*," or (according to Previté's own evidence), "I have known about that for some days, and I do not think anything of it."

Pritchett then went with Previté, and was shown by him the entries which Previté had examined as stated above.

It was conceded that in effecting marine insurances, until the slip is initialed the matter is considered as merely in negotiation. When initialed, the contract is considered concluded. It was proved to be the usage of underwriters to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initialed.

46] *On the 13th of October Fisk returned to London, and was immediately informed by Pritchett of all that had taken place between himself and Previté. Fisk stated that he was the person whose duty it would be to determine, on ascertaining that there had been a concealment, whether the defendants would carry out the insurance.

The course of business as to issuing policies in the defendants' office, is as follows: the business of the office is conducted in two departments, one of which is the underwriting department, and the other that of the secretary and adjuster of claims. After slips are initialed in the underwriter's department they are passed into the secretary's department, and thenceforward the underwriter's department has nothing further to do with them. All the slips taken are forthwith given to the policy writers, and the head of the policy writers obtains the necessary stamps, and the policies are then filled up on the proper stamped forms. This work usually occupies about two days, that is to say, on the day but one after the slips are initialed the policies

are signed by the directors, and are then placed in pigeon holes under the letters of the alphabet in the outer office for delivery. The policies are always dated as of the day of the date of the slip, no matter what delay may occur in filling up the policies.

In this case a policy was filled up according to the tenor of the initialed slip. It was dated on the 12th of October, 1870, but not executed by the directors until the 14th or 15th; and having been deposited in the pigeon holes, was taken away by a clerk of the broker's on the 14th or 15th of that month.

On the 19th of October a telegram was received and posted on the loss book at Lloyd's, showing unquestionably that the vessel lost on the North Breakers was the Cambria, and on the 20th a notice was given by the defendants to the brokers, stating that they held themselves free from liability on the policy.

The defendants had made no objection or protest between the date of initialing the slip and sending this notice to the plaintiff.

The premium, though at once debited to the broker, would only become payable on the 8th of November; it was tendered by the broker, on behalf of the plaintiff, in due time, but the defendants refused to receive it.

*At the trial various defences were set up, a main contention being that the plaintiff had received a telegram from the captain announcing the loss, before directing his brokers to insure on the 8th of October.

The direction of the learned judge in his summing up, so far as is material to this case, was as follows: "When he hears that there has been concealment, the underwriter is not bound to say, 'I will put an end to the policy,' but he has a right at his election to say, 'you have been guilty of a concealment which would entitle me to determine the policy, but I prefer to go on with it;' he has what lawyers call the right of election, but he cannot say, 'I elect to go on,' and then when he hears that there is a loss say, 'Now that I hear there is a loss I will not recognize the policy.' . . . Now comes the third and last question, which I pointed out to you before. I told you that when a man discovers that there has been a misrepresentation of that sort, he cannot keep the contract and get rid of it too. He has a right to say, 'Take back your premium and make the contract a nullity.' He has also a right to say, 'you have done what has entitled me to get rid of the contract, but I will keep the premium and go on.' He has a perfect right to do either of those things, and when he has got notice of the concealment he is bound to make his election within a reasonable time; he is not bound to do it with desperately hot speed. A man cannot wait to take his chance, he must elect within a reasonable time."

After examining the evidence, the learned judge proceeded: "Now Mr. Fisk is the man who determines on these returns of premium. He knows on the 13th of October of all this, as far as this non disclosure goes. He was aware of the fact, and that he might have returned the premium, or had a right to say he would return the premium; and returning the premium would say he was not liable. No doubt if he had offered to return the premium, Mr. Plevité's answer would be, 'I will not take it,' but still Mr. Fisk had no right to continue to hold the premium; he could not play fast and loose; he must either adopt it or refuse it. A good deal has been said about the slip and the stamped policy. I think as regards this part of the case it makes no difference whatever. I believe (you know better 48] than I do) it has *been quite correctly stated that the putting it on the slip is considered in fair dealing and mercantile understanding, as being the contract, as if it were made on that day. This would equally apply if the contract had actually issued as a stamped policy. . . . The defendants knew of the fact, and did not do anything, or take any step, until the news of the loss came. Then the third question of this defence comes to be, do you think that they, having this opportunity (taking into account that they should make the election within a reasonable time) had elected to go on with the contract? If so, that puts an end to the defence. On this I express no opinion at all. I leave this entirely to you."

Four questions were left to the jury by the learned judge, and were answered by them as follows:

First. Did the plaintiff receive the telegram addressed to himself from Galveston by the master, John Owen? No.

Second. Was it material to the underwriters in calculating the premium, or determining whether to take the risk, to know of the telegram which arrived and was in *Lloyd's List* and the *Mercury*? Yes.

Third. Had the broker a right to suppose that the underwriters were acquainted with the contents of *Lloyd's List*? No.

Fourth. Did the defendants' company, after knowledge that the broker had not disclosed this fact, elect to treat the policy as subsisting? No.

The learned judge thereupon directed the verdict to be entered for the defendants on all the pleas except that of fraud.

A rule *nisi* for a new trial was afterwards obtained, on the ground of misdirection on the part of the learned judge in not telling the jury that the defendants were to be presumed to know the contents of *Lloyd's List*, and that the plaintiff was not bound to communicate information contained in them; and

also that on the facts proved with reference to the execution of the policy, without protest, after knowledge of the alleged concealment, the learned judge ought to have directed the jury to find for the plaintiff; and on the ground that on the question of election the verdict was against the weight of evidence.

Feb. 4, 6, 7. *Butt*, Q.C., *J. R. Mellor*, and *Benjamin*, showed *cause. First, the noncommunication by plaintiff to his [49 broker of the memorandum in the *Liverpool Mercury* of the 10th of October was a material concealment, and this fact was relied on by the jury. Secondly, there was a material concealment by the broker. The underwriter is entitled to know the facts known to the broker, and to exercise his own judgment upon them; by keeping silence the broker compelled the defendants to accept his own conclusion. The non-disclosure of facts merely suggesting the inference that the ship may be lost, has been held sufficient to avoid a policy: *McAndrew v. Bell* ⁽¹⁾; in *Court v. Martineau* ⁽²⁾, where the policy was upheld, no such inference could reasonably be drawn. Thirdly, the concealment was of information which the underwriter could not be expected to know. The fact that intelligence is announced in *Lloyd's List* cannot affect underwriters with constructive knowledge of it; this would impose on them the duty of knowing the whole contents of the paper. It is a question of fact; and whatever may have been the force of the inference in former times, it is impossible now to say, as a matter of law, that an underwriter is acquainted with and carries in his head all the vast variety of details which it contains. In *Proudfoot v. Montefiore* ⁽³⁾, it was not even argued that the underwriter had constructive notice of news of the loss of the insured ship which was contained in *Lloyd's List*. The early cases which seem to lay down a contrary rule only show (and in this they probably go too far) that *Lloyd's List* are *prima facie* evidence of the underwriter's knowledge: *Frierc v. Woodhouse* ⁽⁴⁾; if he is misled by the broker, the insurance is void, although the news may have been accessible to both alike *Mackintosh v. Marshall* ⁽⁵⁾; and he is at least as much misled by silence as to a telegram which announces the loss of the vessel insured, as the underwriter was by silence as to the identity of the vessel insured with a notorious cruiser in *Bates v. Heppitt* ⁽⁶⁾. The question is one for the jury, and was rightly left to them: *Gandy v. Adelaide Marine Insurance Company* ⁽⁷⁾. Fourthly, it was never the intention of either party to insure the *Cambria*, *if she were the vessel on the rocks. [50

⁽¹⁾ 1 Esp., 373.

⁽²⁾ 3 Doug., 161.

⁽³⁾ Law Rep. 2 Q. B., 511; see note at p., 518.

⁽⁴⁾ Holt, N. P., 572.

⁽⁵⁾ 11 M. & W., 116.

⁽⁶⁾ Law Rep., 2 Q. B., 595.

⁽⁷⁾ Law Rep., 6 Q. B., 746.

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It was because Previt  had satisfied himself that she was not the vessel on the rocks that he insured her. What passed at the time of effecting the insurance, tacitly and in the broker's own mind, and what took place afterwards more expressly, had relation only to the contingency of the Cambria not being the vessel on the rocks, and limited the insurance to that contingency. There is therefore no identity between the vessel insured and the vessel Cambria which actually was upon the rocks, *Ionides v. Pacific Fire and Marine Insurance Company* ⁽¹⁾. Fifthly, even supposing the last point not to hold, and the policy to be capable of ratification by defendants on discovery of the concealment, it was never ratified. The giving out of the policy was a mere formal act, the slight importance of which is shown by *Xenos v. Wickham* ⁽²⁾. The true contract is made by the initialing of the slip; the slip is the contract, although the policy is the evidence; the issuing of the policy is merely the completion of an act which the underwriter is morally bound to complete. This is shown by *Cory v. Patton* ⁽³⁾, in which it was held that the noncommunication of information received by the assured after the slip was initialed, but before the execution of the policy, did not invalidate the policy; and the decision in *Mackenzie v. Coulson* ⁽⁴⁾ was shown to be founded on the error of supposing the statutes there relied on to be still law. An act which is to operate as an election to affirm a voidable contract must be clear and unequivocal, not such as will equally bear another construction: *Clough v. London and North Western Ry. Co.* ⁽⁵⁾. Here no act was done of that character. The only act that can be relied on is the giving out of the policy; but the combined effect of *Xenos v. Wickham* ⁽²⁾, *Cory v. Patton* ⁽³⁾, the stamp laws, and the usage of underwriters, is that the underwriter who has initialed the slip is under a moral obligation to execute and deliver out the policy in order to enable the assured to try the question of its validity, since to do otherwise would be to decide the case in his own favor, and to prevent an appeal by the assured to an impartial tribunal; that the execution is 51] only of *importance because of the stamp laws, and the mere delivery of the policy is a formal act of very little consequence. There was therefore nothing in these acts equivalent to an election to affirm the contract; nor can any authority be produced showing that the underwriter is bound to make any election until he is called upon to pay.

Holker, Q.C., Herschell and M'Connell, in support of the rule. First, the memorandum of the 10th of October never went to

⁽¹⁾ Law Rep., 6 Q. B., 674.

⁽²⁾ Law Rep., 2 H. L., 296.

⁽³⁾ Law Rep., 7 Q. B., 304.

⁽⁴⁾ Law Rep., 8 Eq., 368.

⁽⁵⁾ Law Rep., 7 Ex., 26.

the jury. Second, there was no concealment by the broker, because he was entitled to suppose that the defendants' underwriter was already possessed of the information contained in *Lloyd's List*. Acquaintance with the contents of *Lloyd's List* had been constantly assumed on the part of the underwriter: *Arn. Mar. Ins.* vol. i. p. 530 (4th ed.); *Mackintosh v. Marshall* ⁽¹⁾; *Friere v. Woodhouse* ⁽²⁾.

[MARTIN, B. Notwithstanding the learned judge's expression of opinion in that case, the question was left to the jury.]

The assured is not bound to communicate what the underwriter ought to know, or may be presumed to know: *Carter v. Boehm* ⁽³⁾; *Lee v. Jones*. ⁽⁴⁾ It is sufficient, therefore, if the announcement of the fact in *Lloyd's List* is *prima facie* evidence of the knowledge of the underwriter; for what a jury may in the absence of contrary evidence presume the underwriter to know, the assured may also presume him to know. Thirdly, there is no question here, as in *Ionides v. Pacific Fire and Marine Insurance Company* ⁽⁵⁾, of the identity of the vessel; the question is only whether a fact relating to the Cambria was not disclosed, which is the ordinary case of concealment. Fourthly, assuming that there was a concealment, the defendants' underwriter was fully informed of the whole facts, at least as early as the 13th of October. The policy was then neither delivered out nor executed. It was the duty of the defendants, on knowing the facts which entitled them to elect, to signify their election, and the jury ought to have been directed that any act done by the defendants after that time, treating the insurance as valid, 52] affirmed the contract and determined their right of *election. Going on with the contract by executing and delivering out the policy was such an act. It was an act which could only be construed in one way. Even if the policy had been executed, *Xenos v. Wickham* ⁽⁶⁾ does not show they would have been bound to deliver it out, or that it belonged to the assured, if they were entitled to rescind on the ground of fraud or concealment. But it had not been executed, and the defendants were certainly not bound to give legal effect to a contract which, if it had been completed, would not have bound them. Assuming, however, that by the practice of underwriters they had considered themselves honorably bound to execute and deliver out the policy, yet since that was an act which, if done in silence, would induce the plaintiff to suppose himself insured, they were bound then at least, if not before, to express their intention to avoid the policy on the ground of concealment. By keeping

⁽¹⁾ 11 M. & W., 116.

⁽²⁾ Holt, N. P., 572.

⁽³⁾ 3 Burr., 1905; 1 W. Bl., 593.

⁽⁴⁾ 17 C. B. (N.S.), 482; 34 L. J

(C.P.), 131.

⁽⁵⁾ Law Rep., 6 Q. B., 674.

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silence they altered the plaintiff's position, and prevented him from insuring elsewhere. If this were otherwise, the case of a holder of a policy, voidable by reason of an innocent concealment, would be worse than that of one whose contract was voidable for fraud; for in the latter case an election is clearly made by any act done under the contract, after knowledge of the fraud.

Cur. adv. vult.

Feb. 8. The following judgments were delivered :

MARTIN, B. I am of opinion that there must be a new trial in this case. The first point was, whether there was a material concealment by the plaintiff himself in not communicating to his broker the memorandum which appeared in the *Liverpool Mercury* on Monday, October 10th. In my opinion this fact was very important, and, if established, would be a material concealment which would avoid the policy; but it seems to me that this point was not brought before the jury in such a way as to justify us in upholding their verdict on that ground.

The second point relates to the concealment by the broker, and we have no doubt that there was a concealment. It was argued that, by reason of the fact appearing in *Lloyd's List*, the underwriter is not in condition to take advantage of the non-communication by the broker. But we are satisfied that this is a question of fact, and that it cannot be assumed as a matter of law that the underwriter saw everything that was contained in that paper. The question was, therefore, rightly left to the jury.

But a third question now arises, which is of very serious importance. The fact is, that certain material telegrams had been communicated to the broker who effected the insurance which he did not communicate to the defendants' underwriter; and we may take it that the reason of this was, as he stated, that he had examined the matter and had satisfied himself that the ship upon the reef was not the *Cambria*. But however that may be, the fact became known to the underwriter shortly after he had initialed the slip, and then, without any intimation that they looked upon it as of any importance, or intended to dispute their liability, the defendants signed a stamped policy and delivered it to the plaintiff. The question is, whether they are now at liberty to say that they are not bound by the policy, on the ground of concealment; and my impression is that they are estopped. If the underwriter, after having acquired a knowledge of the fact of the concealment, gives out a policy without notice, and as if it were binding on him, he does that which would induce the assured to think that he had a valid policy, and to seek no further for insurance. He cannot be allowed to

wait until a loss has occurred, and then elect to rescind, when his own act has put the assured in a condition in which he can no longer insure himself anywhere. I cannot but think that the manner in which the question was dealt with by the lord chief baron ⁽¹⁾ was more correct, and that the proper direction to the jury would be, that if the defendants, by delivering the policy to the plaintiff and retaining the premium, or not rescinding the contract for the premium, would naturally lead the plaintiff to suppose that the policy was delivered to him as a binding contract, that will preclude them from afterwards averring the *contrary. In my opinion, therefore, there [54 must be a new trial.

BRAMWELL, B. I come to the conclusion that this rule should be made absolute with great reluctance, for, upon the whole, I think it probable that justice has been done. But as to the first point, I agree with my Brother Martin (and my Brother Blackburn has also stated to me that he concurs in this view), that the question of the memorandum was not left to the jury, and that they have not expressed any opinion upon it.

Then the question arises as to the concealment by the broker. And I am of opinion that there was a concealment of what it was material that the underwriter should know, and which he did not know. Upon this point, the argument of the plaintiff was that it was not a concealment, on the ground that the underwriter was bound to take notice of the contents of *Lloyd's List*, or, in another way of putting it, that the broker was entitled to assume that the underwriter knew it. I do not agree with that argument. It is impossible to say there is any rule of law, or any principle or authority, which affects the underwriter with knowledge of what is contained in *Lloyd's List*. No doubt some knowledge may be assumed in the underwriter; what, I will not attempt exactly to define or describe, though I agree with what was thrown out by my Brother Cleasby in the course of the argument, that the matters he must take notice of are matters of general knowledge, not matters relating to any particular ship. But to hold that the underwriter is bound to carry in his head all that is contained in *Lloyd's List* relating to a ship in which he has no interest, rather than to hold the owner of the ship bound to disclose it, would be to put a difficult and needless burden on the underwriter, while the opposite

(1) At a previous trial of this cause, before the lord chief baron, at the Liverpool Summer Assizes, 1871 (when the jury were discharged, being unable to agree on a verdict), the learned judge directed the jury that the slip constituted a contract, but that the defendants

having, between the signing of the slip and the issuing of the policy, become acquainted with the telegrams not communicated by Previt , they ought at once to have made a communication to the assured, and refused to issue a policy.

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view puts no difficulty at all in the way of the owner. There was, therefore, a material concealment.

But the next question then arises, whether, if the underwriter becomes aware of the concealment after the slip is issued and before the policy is signed, you may look at the time of initialing the slip as the time when the rights of the parties are fixed. I think, independently of authority, that you can do so; and I have a strong opinion that you could do so in any conceivable state of the stamp laws, for the question does not rest [55] late to the document, but to a period of time not mentioned in the document. There is nothing repugnant to the contract in it. Without using any doubtful or contested terms, such as condition, the obligation of the underwriter is undoubtedly affected by what does not appear upon the policy. If at the time of making the policy a matter which is material is concealed, it defeats the policy; the written obligation is, therefore, controlled by something not appearing on its face. But, if so, you may as well put the time with reference to which the concealment is to operate at any previous period, as at the instant of executing the policy. There is no more addition or contradiction in the one case than in the other. But there is also authority for this. The case of *Cory v. Patton* (¹), in the Queen's Bench, is decidedly in point; it was there held that the assured was not bound to communicate a matter of which he became aware after the slip was initialed. On what ground? On the ground that the initialing of the slip was the time at which the rights of the parties were fixed. Therefore the defendants are at liberty to show that before signing the slip they did not know a matter that ought to have been communicated to them, although before executing the policy they did.

But now comes a matter in which there is great difficulty, and as to which I cannot agree with my Brother Blackburn's ruling at the trial. After the slip was signed, it seems on the same day, the defendants became aware of the concealment of the telegram; and they then knew that the contract was not binding on them. It then became not only their right, but I think also their duty, to say, within a reasonable time, either "We find that there has been a material concealment, and we elect to avoid the policy and to return the premium;" or, "We will retain the premium, and elect to go on with an insurance which is not at present enforceable against us." This would have been so if they had delivered out the policy at the time when the slip was initialed; and it must be equally so though the policy was not given out. If they did not do this within a reasonable time, the contract became binding upon them. It is a

(¹) Law Rep., 7 Q. B., 304.

general principle of law, founded both on justice and authority, that even in cases of fraud, when a man has notice of *any [56 matter which gives him a right either to insist upon a contract or to treat it as void, he must say within a reasonable time whether he determines to go on or to avoid it; and the observation is a forcible one that if the principle were not applicable in this case, a man would have greater power under an innocent than under a fraudulent concealment. Now it seems to me that where the transaction consists of several acts, when the time arrives for taking the next step in furtherance of the contract, then is the time, either as a matter of right in itself, or because it is the natural and reasonable time, for the party who is to take the next step to declare his election. In effect the contract here, whether enforceable or not on the ground of the Stamp Acts, was, "I will become your insurer, and will give you out a policy; but if I discover at any time that there has been a material concealment, I have the right either of avoiding, or of going on and keeping the premiums. It is my right; I have the option to go on or not." Then when the time came for the defendants to take the next step they ought to have declared their election, and if they took that step in furtherance of the contract without intimating that they did not waive their right to treat the contract as void, the plaintiff was entitled to treat it as a notification to him that they had elected not to avoid the contract, but to go on. So that, in my judgment, the defendants ought to have said, "We shall not give out the policy." If the plaintiff had then said, "That is not fair; I deny the materiality of the concealment, and will contest the point;" they might have said, "Well, then, we will give out the policy, but we deny its validity;" and if they did not make such a statement, the assured would be entitled to treat their conduct as an election not to avoid.

It was said in answer to this, that giving out the policy was a thing they could not avoid, because *Xenos v. Wickham* ⁽¹⁾ showed that the policy was the property of the assured from the time of its execution. Now, *Xenos v. Wickham* ⁽¹⁾ did not show that it would be so if the policy was void on the ground of concealment. But, allowing the answer, it only alters the form of the objection, because, instead of saying that the policy ought not to have been given out, we must then say that it ought not to have *been executed. It is said, however, that those [57 who executed it had no authority to do so. But that is not so. The clerks in the office had nothing to do with the underwriting, but they were clerks who were told to make out policies in accordance with the slips; and if it was intended to revoke

(1) Law Rep., 2 H. L., 296.

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their authority, they should have been told not to make out this particular policy. But, further, the policy was signed by the directors, and they had authority to issue the policy or to take the objection. In short, before execution, the matter must have come before officials who had power to tell, and who should have told the clerks not to make out the policy, or who should have refrained from executing it; or if the policy had been executed and had, according to *Xenos v. Wickham* ⁽¹⁾, vested in the plaintiff, then they should have delivered it out with a protest.

But what I understand to be my brother Cleasby's difficulty is this: it is said the delivery was a thing they could not help, and how can a man elect by an act which he does under compulsion? A proposition so stated it is difficult to deal with. In one sense, however, it was not under compulsion. It was done by the defendants as people of honor; but as people of honor they might do it under a qualification; they might say, "We do it as a matter of fairness, but at the same time we maintain that it is not binding in point of law and right." In short, they may do it under such circumstances as will not cause them to lose their right. As to considerations of how the matter would stand if the transaction occurred in some place where there were no stamp laws, and if after a verbal engagement a slip or policy were executed, or a premium received with knowledge of a concealment, it is only the same question in another form; if an act is done in furtherance of an invalid contract, it ought to be accompanied by a statement that it is not to be taken to admit that the contract is valid. Therefore, when the time arrives for giving out the policy, or, if *Xenos v. Wickham* ⁽¹⁾ applies, for executing it, the underwriter should either refuse to do so, or, if the plaintiff insists on his right to have the policy and try the question, it should be given with an intimation that the underwriter elects to avoid.

I do not, however, feel so confident upon this that I should
58] *myself rule, or advise any judge to rule as a matter of law, that the underwriter had elected to affirm the contract. I would rather leave the question to the jury, putting it thus: "Here is an act which if unexplained, shows that the defendant is treating the contract as subsisting; but if in the surrounding circumstances you can find reason for saying that the assured was not warranted in so regarding it, you may find for the defendant. *Prima facie*, however, it is an election, and it is for the defendant to point out some accompanying circumstances, showing that the assured had no right so to understand it." This is not quite what the learned judge did; he should have left it

⁽¹⁾ Law Rep., 2 H. L., 296

to the jury, as putting the burden of proof on the defendant to show that the plaintiff did not understand it, or had no right to understand it, as an election.

For my own part I cannot but think that both Fisk and Pritchett intended to go on, and did not much care for the telegram. I mention this as showing the reasonableness of requiring notice; for if this was so, it is reasonable to suppose that the broker entertained that notion, and, entertaining it, abstained from acting further; whereas if he had been informed of the defendants' intention to avoid the contract, he might possibly have obtained another policy in substitution. The plaintiff has, by the defendants' silence, been deprived of his opportunity of going elsewhere.

CLEASBY, B. If the only question were, whether there was a sufficient finding that there had been a material concealment by the plaintiff, that is a matter of opinion on which I should not have differed from my learned brothers. But as there is another question of great importance, as to the effect of giving out the policy after the slip had been executed and the risk taken, on which I cannot concur in their judgment, I am bound to state also my opinion on the first point. It appears to me that the finding of the jury that there was a material concealment by the plaintiff was warranted by the evidence, and that not only was there sufficient evidence to warrant them in coming to that conclusion, but that they came to it upon the fact of the concealment of the memorandum. The learned judge, it seems, attached very little weight to this circumstance; but the counsel for the defendants attached a good deal, and the jury, I think, took up the point as a *material one and acted upon it. [59 [The learned judge here referred to circumstances showing that the jury acted on this evidence, and proceeded.] Therefore I arrive at the conclusion that the jury found there was a material concealment, and found it upon the suppression of the memorandum. I think, therefore, that the jury have dealt with the whole of the evidence and that we ought not to interfere with their finding.

But the question of greatest importance is that which relates to the effect of the defendant's act in delivering out the policy, after knowledge of the facts, without saying anything to qualify their act. Does this, as a matter of law, operate as a waiver of a matter of defence then in the knowledge of the underwriter? I agree that a man may, by words or by conduct, elect to waive an objection which entitles him to avoid a contract; and if he does so he cannot afterwards set up that objection. But I think that the conduct relied upon here, that is, the defendants' act in giving out the policy without at the time doing anything to

indicate that they reserved their right to insist on the objection, ought not to be regarded as anything in the nature of an election. First, however, I will call attention to the real position of the parties at the time when this knowledge was acquired, for I cannot think that the underwriter for a moment had any intention or idea of insuring against the contingency of the Cambria being the vessel which was upon the rocks. The whole negotiation shows this to be so. The risk was taken before there was any idea of such a state of things; the premium was founded on the class of the vessel, the nature of her voyage, and the time that had elapsed; and no intention was ever directed to the contingency of the Cambria being the vessel on the rocks. As to what happened on passing through the room, I look on it as a mere assurance by Previté that the announcement did not concern the matter at all; he knew of it, and knew that there was nothing in it; and on that footing the transaction goes on, that is, on the old footing. What passed then is conclusive to show that nothing was ever done to introduce a new risk, a new intention founded on a new idea, namely, that the Cambria was the vessel on the rocks. This takes the case out of the region of election altogether.

But supposing this to be otherwise, and supposing also that 60] there *was a discovery of a material concealment, what was the effect of giving out the policy? Now, the contract was not made by the policy; the only real contract was made by initialing the slip. A contract is constituted by the concurrence in intention of two parties, the one promising something to the other, who on his part accepts the promise; it is binding at the time when the two parties separate with that idea in the mind of each; the idea of the one being "I promise," and of the other, "I accept." Thus in the Statute of Frauds (s. 17), which provides that "no contract . . . shall be allowed to be good," unless evidenced in a certain way, what has taken place by word of mouth is spoken of as a contract. The particular evidence or mode of expression required by the statute to make it enforceable at law is a different matter. But to add that expression is a matter of obligation, a thing required not by any arbitrary code, as the use of the term honor would seem to signify, but by conscience and the sense of right prevailing universally, and under the influence of which all the transactions of life take place. The effect of this is, that when, as frequently happens, several acts must be done to complete the transaction, although in fact consecutive they are nevertheless treated as contemporaneous, and the whole is said to take place *uno flatu*. Thus here, the slip having been initialed, and the premiums paid or promised, the policy, whenever it is given out, is as

between the parties to be taken as executed *uno flatu* with the actual making of the contract. This is the view acted upon in *Cory v. Patton* ⁽¹⁾; the Court of Queen's Bench there regarded the policy as given out *uno flatu* with the initialing of the slip; they held the plaintiff entitled to consider the matter as then concluded, and the rights of the parties fixed, and they therefore held the fact that the assured afterwards became aware of material facts which he did not communicate to the underwriter, an immaterial circumstance; in other words, they treated the slip and the policy as the same document. The house of lords also, in the case of *Xenos v. Wickham* ⁽²⁾, dealt with a similar question in a way justifying the conclusion I have arrived at; for they held that the date of formal delivery was immaterial. They obviously considered that the exercise of the mind or the intention to deliver was the material thing, and that the *policy, though still in the pigeon holes of the underwriter, [61 was to be treated as if actually delivered. That being so, a contract having been made, and what follows afterwards having reference to the time of the contract, the doctrine of election does not apply. The mind of the underwriter is not then directed to any other idea than that of giving out a formal document. That is an act done as a matter of course; how then can it be an act of election? The evidence in my opinion justifies the view. Therefore in my opinion, the learned judge was right in not telling the jury that giving out the policy was of itself an election (under the new state of circumstances that had arisen) not to avoid the contract, but to keep it on foot; and in leaving the question generally to the jury, whether the defendants had adopted the contract by not taking the objection within a reasonable time; and I also think their verdict right.

There is another matter of importance. In dealing with the question of election, we ought to take into consideration the position of the person doing it as regards knowledge of all the facts. Now on this point there was upon the evidence matter which, if gone into fully might materially influence the consideration of whether the underwriter did or did not elect. They might have acted under the impression that nothing was known to the plaintiff; and their knowledge of the memorandum not communicated by him (apart from the question of whether that non disclosure avoided the contract), might have materially influenced any election they might have been disposed to make.

In my opinion this rule should be discharged.

Rule absolute.

Attorneys for plaintiff: *Sharpe, Parker, & Co.*

Attorneys for defendants: *Thomas & Hollams.*

⁽¹⁾ Law Rep., 7 Q. B., 304.

⁽²⁾ Law Rep., 2 H. L., 296.

C A S E S

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXVI VICTORIA.

[Law Reports, 8 Exchequer, 73.]

Jan. 20, 1873.

SANDERSON v. ASTON.

*Surety—Discharge of Surety by alteration of the Guaranteed Contract—
Material Alteration.*

Declaration on a bond given to the plaintiff by the defendant, which recited that by an agreement of even date the plaintiff had agreed to admit J. into his service as "clerk and traveller" (not further stating the terms of the agreement.) and was conditioned for J.'s accounting for and paying over to the plaintiff all moneys which he might receive on plaintiff's account; the breach alleged being that J. had received moneys for the plaintiff which he had not accounted for or paid over.

Pleas, on equitable grounds. 2. That the original agreement between the plaintiff and J. was that it should be terminable by one month's notice; and that the plaintiff and J. afterwards, and before the defaults sued for, made it terminable by three month's notice, without the defendant's consent.

3. That before the defaults sued for, J. had committed other defaults of the same kind; that the plaintiff had, with knowledge of those defaults, continued to employ J. in his service without notice to the defendant; and that the defaults sued for were committed during such continuance of the service. On demurrer to these pleas:

Held, first (Martin, B. doubting), that the second plea was bad, on the ground [74] *that it did not show that the term as to the period of notice was made part of the defendant's contract, and that the alteration alleged did not in fact materially add to the defendant's risk.

Secondly, that the third plea was good, on the authority of *Phillips v. Foxall* (Law Rep. 7 Q. B., 666).*

* 3 Eng. Rep., 259, and see note, page 272.

DECLARATION on a bond given by the defendant to the plaintiff, the condition of which recited that, by an agreement of even date, the plaintiff had agreed to admit into his service, as clerk and traveller, one John Thomas Johnson, upon Johnson's obtaining two sureties "for his duly and faithfully accounting to the plaintiff, his executor's, etc., and other the person or persons who should or might become partner or partners with the plaintiff in his business of a lead, glass, and color merchant, in manner thereafter mentioned, and for his faithful and honest conduct during the time of his continuance in the said service;" the condition of defeasance being that Johnson should from time to time, and at all times, well and satisfactorily account for, and pay over and deliver to the plaintiff all and every sum and sums of money, etc., which he should receive for the use of the plaintiff or the plaintiff and any person who might become his partner; and the breach alleged being, that Johnson did not well and satisfactorily account for, or pay over, or deliver to the plaintiff, or to the plaintiff and his partner, certain sums of money (amounting to 84*l.* 9*s.*) received by him for the use of the plaintiff and his partner during his service with them.

Pleas: 2. On equitable grounds, that it was one of the terms of the agreement in the said condition mentioned, that the agreement should be terminated by one month's notice on either side; and that, afterwards, the plaintiff and Johnson, without the knowledge, privity, or consent of the defendant, altered the agreement and made it terminable by three month's notice on either side, and thereby materially increased the risk of the defendant as surety, and that the defaults alleged were committed by Johnson after the alteration.

3. On equitable grounds, that Johnson, before the commission of the said defaults, had committed during the said service divers other defaults of the same kind; and that the plaintiff, though well knowing the said last mentioned defaults, wholly omitted and neglected to inform the defendant thereof, and, not- [75 withstanding the said last mentioned defaults, continued to employ and retained Johnson in the said service; and that the defaults alleged were committed by Johnson during the said continuance and retention of him by the plaintiff in the said service.

Demurrers and joinder.

R. G. Williams, for the plaintiff. The second plea is bad. It does not show that the terms of the agreement between Johnson and the plaintiff were made part of the defendant's contract; the defendant guarantees Johnson generally in his employment of clerk and traveller to the plaintiff. If he had made the particular terms of that service part of his contract, the plaintiff

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would, no doubt, have been unable to alter any of those terms without discharging him: *North Western Ry. Co. v. Whinray* ⁽¹⁾; *Frank v. Edwards* ⁽²⁾; but where this is not done, the surety can only claim to be released when his position has been materially altered by the change, either by increasing his liability, or by diminishing his security: *Bonar v. Macdonald* ⁽³⁾. The change here made in the duration of the notice cannot really affect the defendant's risk; it is of far less consequence than the change in the period of accounting, which was held not to discharge the surety in *Stewart v. McKean* ⁽⁴⁾. The third plea is also bad; it is pleaded on the authority of *Phillips v. Foxall* ⁽⁵⁾. That case, however, as well as the observations of Malins, V.C., in *Burgess v. Ere* ⁽⁶⁾, on which the decision was chiefly founded, proceeded on the ground that the defaults which the employer had condoned without the knowledge of the surety involved dishonesty, which would have entitled the employer to dismiss. But there may be many defaults which would not entitle the employer to dismiss, and it is not averred, neither is it to be assumed, that the defaults alleged in the plea were not such.

Lewers, for the defendant, was directed to confine himself to the second plea. The second plea is good. If the agreement between the plaintiff and Johnson was altered in any respect, it became a new and different agreement, and the surety is discharged; *or, rather, it becomes an agreement which the surety had never guaranteed: *Tuyleur v. Wildin* ⁽⁷⁾. But, further, the alteration was a material one; it took away from the surety the security which would be afforded to the employer (and therefore to himself) by the power of dismissing a clerk on a short notice.

R. G. Williams, in reply.

KELLY, C.B. I am of opinion that there is nothing in the matters alleged in the second plea to discharge the surety. The authorities cited go to show that we are to look at the terms of the surety's engagement; not at the terms of any agreement between the employer and employed, unless these terms are made part of the surety's agreement, or unless something has been done, which, with reference to those terms substantially alters his position. Now the plea alleges that it was a term of the contract between the employer and employed, that the service should be terminable by one month's notice, and that afterwards, and before the defaults in respect of which the action is brought, they varied the contract by providing that the service

⁽¹⁾ 10 Ex., 77; 23 L. J. (Ex.), 261.

⁽²⁾ 8 Ex., 214; 22 L. J. (Ex.), 42.

⁽³⁾ 3 H. L. C., 226.

⁽⁴⁾ 10 Ex., 675; 24 L. J. (Ex.), 145.

⁽⁵⁾ Law Rep., 7 Q. B., 666.

⁽⁶⁾ Law Rep., 13 Eq., 450.

⁽⁷⁾ Law Rep., 3 Ex., 303.

should only be terminable by a three months' notice on either side. And if it clearly appeared that the surety had entered into the agreement on the faith of the original contract, that is, if notice had been given to him of the terms of the contract, and he had, after that notice, entered into this bond, he would undoubtedly have been discharged by the alteration. The case of *North Western Ry. Co. v. Whinray* ⁽¹⁾, shows that if the agreement between the employer and employed had been made the basis of the surety's contract, and if for that original agreement another had been substituted determinable on a different event, that which was the basis of the surety's contract would be gone, and the surety would be discharged. But it does not appear that the surety ever had notice of that agreement, further than that the plaintiff had agreed to employ Johnson as traveller upon his obtaining two sureties for his "duly and faithfully accounting," and for his "faithful and honest conduct."

But the third plea raises a different question. The case of *Phillips v. Foxall* ⁽²⁾ clearly shows that, if any defaults or breaches of duty, whether by dishonesty or not, have [77 been committed by the employed against the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him. The question therefore is, whether the allegation of the plea shows such breaches of duty as would have entitled the plaintiff to dismiss Johnson, and would, therefore, have entitled the surety to call upon him to do so. It is said that no dishonesty is shown by the plea. That may well be and yet the employed by failing to pay over money which he has received may commit a breach of his duty, which would entitle his employer to dismiss him. Now we must take it on the plea, reading it with the declaration, that Johnson had received for the plaintiff certain sums of money which it was his duty to pay over, and which he did not pay over, and the question is, whether that is not *prima facie* a breach of duty which would entitle the plaintiff to dismiss him. I am of opinion that it is, and that it is sufficient if the plea raises such a *prima facie* case.

MARTIN, B. I think the third plea is good on the authority of *Phillips v. Foxall* ⁽²⁾.

It is my impression that the second plea is good also; for I think the declaration must be taken as meaning that the defendant was to guarantee Johnson's fidelity in that service which he entered on with the plaintiff; and I apprehend that, if afterwards the plaintiff and Johnson entered into a new contract

(1) 10 Ex., 77; 23 L. J. (Ex.), 261.

(2) Law Rep., 7 Q. B., 666.

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which would cast a new liability upon the surety, the surety was discharged. Now, if by the original contract Johnson was liable to be dismissed at one month's notice, and that is afterwards altered into a contract for a three months' notice, that is a material alteration, involving a new liability in the surety, and which, therefore, if entered into without his consent, will discharge him. I do not, however, entertain this opinion so strongly as to induce me to dissent from the judgment of the court.

PIGOTT, B. I think the second plea is no defence. It is pleaded on equitable grounds, and the fact relied on is, that the agreement between Johnson and the plaintiff was made determinable by a three months' notice instead of a one month's notice, without the knowledge or consent of the surety, whereby the risk of the surety was materially increased. I think the averment that the risk was materially increased is a proposition of law, an inference from the previous statement; we have to see whether that is a proper inference, so as to give the surety a defence in equity, and I am of the opinion that it is not. If the creditor agrees to change the terms of his contract with the person on whose behalf the guaranty is given, and does thereby increase the surety's risk without his consent, the surety is discharged. Equally, if the surety chooses to contract on the terms of the original agreement, so as to make that agreement a material part of his contract, he is discharged by the alteration. But if (which appears to be the case here) the change of terms takes place in an agreement which is merely collateral to that of the surety, and is not made a part of it, and if it is also quite immaterial to the risk, it affords the surety no answer. Now, I think this change did not affect the surety's risk at all. If a notice were given for three months as required by the new agreement, his risk would not extend over the whole three months, but would terminate at the end of the first month. He is therefore no worse off because of the change, and his plea therefore fails.

As to the third plea, I agree that is good for the reasons already given.

POLLOCK, B. I also agree that the third plea is quite within *Phillips v. Foxall* ⁽¹⁾.

As to the second plea, after what has been said by my Brother Martin, I express my opinion with some diffidence, but I think it is bad. Pleas of this kind are well known at law, and *Whitcher v. Hull* ⁽²⁾ is a leading case upon the subject. In that case there was an agreement between the plaintiff and Joseph

(1) Law Rep., 7 Q. B., 606.

(2) 5 B. & C., 269.

Hall for the letting of the milking of thirty cows, and that agreement was imported into the contract by which James Hall, the defendant, guaranteed to the plaintiff the payment by Joseph Hall of the rent. A change being afterwards made in the number of the cows, the surety was held to be discharged, and Baley, J., *says ⁽¹⁾: "The new agreement was binding [79 only on the persons who were parties to it. If it had been intended to bind James by it, he should have been consulted; he had a right to insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may perhaps be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is whether the contract performed by the plaintiff is the original contract to which the defendant was a party." That case (which was no doubt a very strong decision) has been acted on ever since, when the party who has become surety has taken care that the original agreement should be made part of his contract. But in the cases cited to us, where the original contract was not made part of the surety's contract, but the court has nevertheless said that the surety was discharged, there has been some material alteration in the terms of the original agreement, in this sense, that the surety has been injured or put in a worse position by the change. It is therefore open to the court in such cases to consider whether the alteration is a material one or not, and I am of opinion that the alteration in the present case is not so. The distinction I have adverted to was no doubt in the mind of the pleader when he pleaded this plea on equitable grounds.

*Judgment for the plaintiff on the demurrer to the 2d plea;
for the defendant on the demurrer to the 3d plea.*

Attorneys for plaintiff: *Cunliffe & Beaumont.*

Attorneys for defendant: *Lambert, Burgin, & Peller.*

⁽¹⁾ 5 B. & C., at p. 275.

In *Black v. The Ottoman Bank*, 15 Moore's P. C. 472; Black was surety for the honesty of the bank cashier. The bank by diligence in examining and checking the cashier's account might have detected his defalcation: Held that a failure to do so did not discharge the surety. The court held that the mere passive act of the principal to whom a guarantee is given, or his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him, does not discharge the surety; there must be some positive act

done to the prejudice of the surety or such degree of negligence as to imply connivance and amount to fraud. The rule at law and in equity is the same and is distinguishable from the rule applied to bills of exchange, which depended upon mercantile usage. The surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation, because the employer fails to use all the means in his power to guard against the consequences of dishonesty.

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Cragoe v. Jones.

[Law Reports, 8 Exchequer, 81.]

Jan. 22, 1873.

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*CRAGOE V. JONES.

Joint and Several Bond — Release of one of the Joint and Several Debtors — Principal and Surety.

To an action on a bond the defendant pleaded that it was the joint and several bond of himself and J., and was executed by him as surety only for J.; that afterwards a composition deed was made between J., of the one part, and the plaintiff and another on behalf of all the creditors of J. of the other part, whereby J. conveyed to the parties of the second part all his estate to be administered for the benefit of his creditors "in like manner" as if J. had been adjudged bankrupt; and each of the creditors released J., from his debts "in like manner as if he had obtained a discharge in bankruptcy;" and that the plaintiff executed this deed without the consent of the defendant. On demurrer:

Held (by Kelly, C. B., and Bramwell, B., Pigott, B., dissenting), a good plea.

DECLARATION that the defendant by his bond dated the 18th of September, 1863, became bound to the plaintiff in the sum of 200*l.*, subject to a condition that if one Thomas Jones and the defendant or either of them should pay the plaintiff 100*l.* with 5 per cent. interest on the 18th of March then next ensuing, the bond should be void, but otherwise to remain in force; yet Thomas Jones and the defendant did not, nor did either of them, pay the said 100*l.* and the same is still due and unpaid.

Plea: That the bond declared on was a joint and several bond of the defendant and Thomas Jones, and was executed by the defendant as surety only, whereof the plaintiff had notice, and afterwards and before action a deed was entered into between Thomas Jones of the one part and one Ackerman and the plaintiff of the other part, on behalf and with the assent of the creditors of Thomas Jones, whereby T. Jones conveyed all his estate and effects to Ackerman and the plaintiff to be administered for the benefit of the creditors of T. Jones, "in like manner as if the said Thomas Jones had been at the date hereof duly adjudged bankrupt, and in consideration of the premises each of the creditors of the said Thomas Jones doth by these presents release the said Thomas Jones from his and their respective debts in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy;" and that the plaintiff duly executed this deed without the consent and request of the defendant so to do.

82] *Demurrer and joinder in demurrer.

Nov. 18. *Murphy*, in support of the demurrer, contended that the deed relied on in the plea was not an absolute release, but only a covenant not to sue. The principal debtor was only placed in the same position as if he had obtained a discharge in

bankruptcy. Creditors' rights against sureties were therefore reserved: *Bateson v. Gosling* ⁽¹⁾; *Lewis v. Jones*. ⁽²⁾

Bosanquet, contra. The deed relied on in the plea was not executed under any Bankruptcy Act, and the plaintiff was bound by it not because of any provision of the bankruptcy laws, but because he himself executed it. It is his deed tying his hands against the principal debtor. Thus he has discharged the surety; or, setting aside the allegation that the defendant was surety for Thomas Jones, the plaintiff has precluded himself from proceeding against one of two joint and several debtors. He has, therefore, released the other.

Murphy, in reply.

Cur. adv. vult.

Jan. 22. The following judgments were delivered:

KELLY, C.B. I am of opinion that the defendant is entitled to the judgment of the court. This is a case of creditor, debtor, and surety. One Jones was indebted to the plaintiff in the sum of 100*l.*, and the defendant was his surety. The plaintiff now sues the defendant for the debt, and he pleads that the plaintiff has released the debtor without his consent, and he is therefore discharged. Now the law upon this subject is clear and well settled. If the creditor, without the consent of the surety, by his own act destroy the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged. But the plaintiff contends that in this case he has reserved to himself the right to recover against the surety by the deed in which the debtor is released. The plea of the defendant sets forth the deed in *hæc verba*; by which it appears that Jones, the debtor, having assigned all his estate and effects to the plaintiff and another as trustees for the benefit of his creditors, the plaintiff and the other *creditors, in consideration of the premises, did release the said Thomas Jones from his (and their) respective debts, "in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy." Now the question is this, what is the effect of a release in these terms upon the rights and the condition of these three parties? It appears to me that the meaning of these words is clear and unambiguous. If Jones, the debtor, had obtained a discharge in bankruptcy he would have been discharged not only as against the plaintiff, the creditor, but also as against the defendant, the surety. It seems to me, therefore, free from doubt that the plaintiff by this release, having discharged his debtor as against the surety as well as himself, and without the consent of the surety, the surety is himself discharged.

⁽¹⁾ Law Rep., 7 C. P., 9.

⁽²⁾ 4 B. & C., 506, at p. 515 (n).

It is contended that this is a qualified or conditional release; but I look in vain throughout the deed for any words of qualification, or reservation, or imposing or creating a condition. It is true that if a debtor has obtained his discharge in bankruptcy the creditor may still recover against the surety, and he or the surety, if he pay the debt, may prove against the debtor's estate under the bankruptcy. If, therefore, the debtor had really become bankrupt and obtained his discharge, although the creditor might have recovered against the surety, notwithstanding the discharge of the debtor, his right or power to do so would have been the act or consequence of the law or the statutes of bankruptcy, whereas here the discharge of the surety is his own act; and he cannot by his own act reserve to himself the right to sue the surety, notwithstanding the discharge of the debtor, except by the agreement of the debtor that, notwithstanding his discharge, in case the creditor shall recover against the surety, he will remain liable to the surety for the debt. The whole case upon this deed simply stated is that the plaintiff has released his debtor in like manner as if he had obtained a discharge in bankruptcy, and inasmuch as, if he had obtained a discharge in bankruptcy, he would have been absolutely released, and neither the plaintiff nor the defendant could have afterwards sued him for the debt, he is absolutely released now, and as such absolute release was without the consent of the surety, the surety is by law discharged. It is argued that a creditor may release his debtor and reserve to [84] himself the right to sue the *surety, and that no doubt may be done, but only where the language of the release, or of the deed in which it is contained, is such that the debtor accepts the release subject to the conditions that he shall remain liable to pay the debt to the surety in case he shall have paid it, whether voluntarily or under process, to the creditor. Such was the case in *Bateson v. Gosling* ⁽¹⁾, where the release was contained in a trust deed under the Bankruptcy Act of 1861, but which was followed by a proviso that if the creditors, including the plaintiff, had any security for their demands, "or any demands against the debtor to the payment whereof any person or persons is or are liable as a surety or sureties; the debtor may execute these presents without prejudice to the same security, or to the claim against any surety or sureties." And this proviso was held to convert the release into a mere covenant not to sue, and to preserve the right of the creditor to sue the surety, and of the surety to sue the debtor; and Willes, J., in his judgment expressly states: "When the release in the deed is looked at it is in terms a release subject to a proviso, and although but

(1) Law Rep., 7 C. P., 9.

for such proviso it would be an absolute release, so that there could be no proceeding afterwards against a surety, yet the proviso expressly reserves the creditors' remedy against a surety, and stipulates that any creditor may execute the deed without prejudice to his claim against any surety." (And again) "But if the principal debtor consented to the creditor having recourse to the surety the latter would not be discharged, and would have his remedy against the principal debtor." So that the release in that case was no discharge of the debtor as against the surety by reason of the proviso. Here there is no such proviso, nor is a single word to be found throughout the deed pointing to any qualification or any reservation whatsoever. The release is in its terms a simple and absolute release by the creditor of his debtor in like manner as if the debtor had obtained a discharge in bankruptcy. If the debtor had obtained a discharge in bankruptcy the surety would have had no right of suit against him, and as the plaintiff, the creditor, has put his debtor in a condition in which the surety has lost his right to proceed against him, and this act has been done by the plaintiff, the creditor, without the consent of the surety, I hold that he *has thereby discharged the surety, and this action [85 is therefore not maintainable.

BRAMWELL, B. It is clear that when a debtor is released and discharged by the act of the creditor, that is, when he can plead in bar to an action by a creditor that creditor's voluntary act, a joint debtor, though the obligation be joint and several, can plead the same matter in bar. Has the plaintiff done this? I think he has. He has executed a deed whereby he releases Thomas Jones in like manner as if he had got his discharge in bankruptcy. Would that be a good bar if pleaded by Thomas Jones to an action brought by the plaintiff against him? Why not? In terms it releases, but it adds "in like way as if the discharge in bankruptcy had been obtained;" but such a discharge would have been a bar to an action by the now plaintiff against him. Therefore he releases him in like manner as an order of discharge, which would have been a bar, would operate. Therefore the plaintiff has released Thomas Jones, and so has released the defendant or furnished the defendant with a bar. This construction gives effect to the words "in like manner as a discharge in bankruptcy," because those words give the plaintiff a right to retain any lien or security he has got, which right he would not have if he had given a simple release. The plaintiff proposes to read this as though the words were "I release you with no other consequence than a discharge in bankruptcy would have." In that case it might be that those

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words would qualify the release, and turn it into a covenant not to sue. But those are not the words. They are, "I release you as though you had got a discharge in bankruptcy." This is no technical view of the case. I think it extremely probable that the parties meant what I say they have said. I have not noticed the fact that the defendant says he was a surety; had he been only a surety and not a joint debtor, I think he would have been discharged on the principle I have mentioned, viz., that the plaintiff by his own act had given a bar to the principal debtor.

PIGOTT, B. (1) This was an action on a bond, and the plea [86] *stated that the bond was a joint and several bond of the defendant and one Thomas Jones, and that it was executed by the defendant as surety only for the said Thomas Jones; that after the execution of the bond a deed of composition was made between Thomas Jones of the one part, and the plaintiff and one Ackerman on behalf and with the assent of the creditors of said Thomas Jones of the other part; whereby Thomas Jones conveyed all his estate to the plaintiff and Ackerman to be administered for the benefit of his creditors "in like manner as if Thomas Jones had been at the date thereof adjudged bankrupt," and in consideration of the premises each of the creditors did release Thomas Jones from his debts "in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy." It then averred that the plaintiff executed the deed without the consent or request of the defendant.

To this plea there was a demurrer, and the question is what is the effect of the release given in the deed by the plaintiff to Thomas Jones. The law, since the decision of *Kearsley v. Cole* (*), has been settled to this effect, that in a composition deed between a debtor and his creditor the latter may reserve his remedies against a surety, and thus prevent the latter from being discharged. "The reservation of remedies has that effect upon this principle," says Baron Parke in his judgment; "first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the debtor being impaired; the injury to such rights being the other reason. For the debtor cannot complain, if the instant afterwards the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is impliedly consent that the

(1) Pigott, B., stated that Channell, J., of the court, concurred with him. B., who heard the argument, but before that judgment should be for the plaintiff, for judgment had ceased to be a matter of course.

(*) 16 M. & W., 128.

surety shall have recourse against him." In the recent case of *Bateson v. Gosling* ⁽¹⁾, Willes, J., also says, "If the principal debtor consented to the creditor having recourse to the surety, the latter would not be discharged, and would have his remedy against the principal debtor;" and concludes thus: "It comes round, then, to this, that if the principal debtor be absolutely discharged of the debt, the creditor can have no remedy against the surety." Such being the law on this subject, *the pre- [87 sent question (as I think) is one of construction, namely: is the principal debtor absolutely discharged of the debt by this deed, or is it only a composition of and a personal discharge from the principal creditor's claim? Of course this depends upon the meaning of the language they have used; they are not bound to use the precise language of courts of law, it is enough if they express themselves so that their meaning can be ascertained. It is as follows, "each of the creditors doth by these presents release the said Thomas Jones from his debts;" if the release stopped there it would be clear enough, but the release has this additional language, viz., "in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy." Now the words "in like manner," etc., are not redundant, but obviously are introduced for some object, and we are bound to give them some application if they are capable of it; and there is an application. He retains his securities, and if they do not qualify the words of release, what meaning can be given to them? If this plaintiff, instead of having a surety to resort to for this debt, had had a pledge for it, how could it be contended that under such a form of release as this he could be taken as intending to give up his pledge? But if the release be absolute, he would be so bound (vide *Cowper v. Green* ⁽²⁾). Then, if his pledge is reserved to him, why is not the right to resort to a surety? I cannot see how this form of release makes any distinction between them. "In like manner" must mean in the same way, or to the same extent; but I think that composition having now taken the place of bankruptcy proceedings very much gives the key to this form of release, and that the parties evidently meant to give and to receive under this deed a release having a similar effect to a discharge in bankruptcy as between those covenanting parties, and no more; the right to retain the pledge and also resort to a surety being in such case preserved. If the latter in his turn sues the debtor, he is only in the same position as if he had agreed to a reservation of remedies in the most precise terms, or as if the principal creditor had expressly covenanted only not to sue him, or that the discharge should be personal only. We know that it is the object of the legislature not to

(1) Law Rep., 7 C. P., 9.

(2) 7 M. & W., 633.

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drive debtors into a bankruptcy court. And there can be no 88] hardship upon the debtor *in giving effect to his own covenant, for he has chosen to compound upon those terms, the best he could make, and they are obviously just as between all parties. Nor can the true construction of a covenant entered into between parties be made to depend upon any rules of pleading. If they have agreed to a qualified or personal discharge of the debtor only, it cannot be turned into an absolute one against their intention by any form that the pleadings can take.

The true construction of their language must govern their rights, and where their language is inaccurate, still it is to be expounded *ut res magis valeat*; but to give no meaning to the language, when it is plainly capable of it, would be at variance with every rule of exposition. For these reasons, I think the plaintiff is entitled to judgment. *Judgment for the defendant.*

Attorney for plaintiff: *W.M. Hacon.*

Attorney for defendant: *C. J. Allen.*

[Law Reports, 8 Exchequer, 8F.]

Jan. 23, 1873.

OSBORN V. GILLETT.

Negligence causing Death — Actio personalis moritur cum persona — Master and Servant.

A master cannot maintain an action for injuries which cause the immediate death of his servant.

Declaration against defendant for injuries caused to E., plaintiff's "daughter and servant," by the negligent driving of defendant's servant, by reason whereof she afterwards died; claiming as special damage the loss of E.'s services, and her burial expenses.

Pleas, 3, that E. was killed on the spot.

4. That the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted. On demurrer to these pleas:

Held, first (by Kelly, C.B., and Pigott, B.; Bramwell, B., dissenting), that the 3d plea was good; secondly (by the whole court), that the 4th plea was bad.

DECLARATION, stating that at the time, etc., and thence until the time of her death, one Elizabeth Osborn was the daughter and servant of the plaintiff; that the defendant by John Broadwater his servant negligently drove a wagon and horses against 89] *the said Elizabeth Osborn, whereby she was wounded and injured, and by reason thereof afterwards died; whereby the plaintiff lost the service of the said Elizabeth Osborn, and the benefits and advantages which would otherwise have accrued to him from such service, and was put to expense in conveying to his house the body of the said Elizabeth Osborn, and was after-

wards and necessarily put to and incurred expense in preparing for, and in and about and incidental to the burial of the same.

Pleas, 3, that the said Elizabeth Osborn was killed upon the spot by the acts and matters mentioned in the declaration, so that the plaintiff did and could not sustain any damage which entitles him to sue in this action for the acts complained of.

4. That the acts and matters complained of in the declaration amounted in law to a felonious act by the said John Broadwater committed; and Broadwater at the commencement of this suit had not, and has not since, been tried, convicted, or acquitted of, nor in any manner prosecuted for, the said offence, although nothing ever existed to render such prosecution unnecessary, improper, inexpedient, or to entitle the plaintiff to sue in this action without the same having taken place.

Demurrer and joinder.

Nov. 13. *Graham*, for the plaintiff. The fourth plea is clearly bad. *White v. Speltique* ⁽¹⁾ established that the rule as to the right of action being suspended by the felony, whatever its extent may be, was, at any rate, not applicable except between the party injured and the criminal himself; and the late case of *Wells v. Abrahams* ⁽²⁾, in which all the authorities were reviewed, makes the whole rule very questionable. The third plea is also bad. No question can be raised on this demurrer as to whether there was in reality a service. The declaration alleges it as a matter of fact, and it is a fact which very slight circumstances will suffice to prove: *Evans v. Wallon*. ⁽³⁾ No allegation need be made as to the nature of the service: *Martinez v. Gerber*. ⁽⁴⁾ It is, however, contended that no action can be brought because the plaintiff's daughter was killed instantaneously. But the plaintiff is not the less damaged because he loses the ser- [90 vices of his daughter at once.

[BRAMWELL, B. Are you not entitled to throw the burden of argument on the other side? It is admitted that if the servant lives for six months the master would have had an action. Why has he not one because the servant dies at once?

KELLY, C.B. Could an annuitant bring an action for the killing of the *cestui que vie*?

BRAMWELL, B. No; because there is no legal relation between the two.]

The notion that an action cannot be brought in such a case seems to be founded on what is said in *Higgins v. Butcher* ⁽⁵⁾; but in that case the action was brought for injuries to the plaintiff's wife, whereby she was killed, and the argument was that

(1) 13 M. & W., 603.

(2) Law Rep., 7 Q. B., 551

(3) Law Rep., 2 C. P., 615.

(4) 3 M. & G., 88.

(5) Yelv., 89.

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the husband could not sue because in such an action it was necessary to join the wife. No such argument can apply here, for the master cannot join the servant in suing. The servant may sue for the injury done to himself, and to this action the master is no party; the master may sue for loss caused to him by the injury to the servant, and to this the servant is no party. The damages recovered by the one can never be any recompense for the loss sustained by the other. Further, what is said in *Higgins v. Butcher* ⁽¹⁾ is very much involved with the question as to the effect of a felony on the power to sue, on which point its authority is shaken by *Wells v. Abrahams*. ⁽²⁾

Prentice, Q.C. The fourth plea is within *Higgins v. Butcher* ⁽¹⁾; but the third plea is, at any rate, good. The maxim applies, *actio personalis moritur cum personâ*. The policy of the law refuses to recognise the interest of one person in the death of another, and no instance can be produced of an action having been brought in respect of the death of a person before Lord Campbell's Act. In *Baker v. Bolton* ⁽³⁾ it was laid down by Lord Ellenborough that "in a civil court the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence." This view is in conformity with what was 91] thrown out in *Higgins v. Butcher* ⁽¹⁾, and *it has been followed in the American courts in *Eden v. Lexington and Frankfort Ry. Co.*, ⁽⁴⁾ and in *Carey and Wife v. Berkshire Ry. Co.* ⁽⁵⁾, where the earlier case of *Ford v. Monroe* ⁽⁶⁾ was discussed and dissented from ⁽⁷⁾. Lord Campbell's Act (9 & 10 Vict. c. 93) also amounts to a legislative declaration that it is the law that the action dies with the person; if it were not so, the act need not have been passed, nor could it have been truly recited in the preamble that "no action at law is now maintainable against a person who by wrongful act, neglect, or default, may have caused the death of another person." The legislature has considered the matter, and has carefully limited the relief which it has provided.

Graham, in reply. The plaintiff's interest is not in the death of his servant, but in her life, and of the benefit of this the defendant's act has deprived him. Lord Campbell's act only had in view the case of the right of action of the person killed, and the persons for whom that statute makes provision are persons who would have had no action in his lifetime for injuries done to him. Neither the statute, therefore, nor the preamble—which has regard only to the matter of the statute—affect this question. At least the plaintiff is entitled to recover for the expense of

⁽¹⁾ Yelv., 89.

⁽²⁾ 1 Camp., 493.

⁽³⁾ Law Rep., 7 Q. B., 554.

⁽⁴⁾ 14 B. Monroe, 204.

⁽⁵⁾ 1 Cush. (Mass.), 475.

⁽⁶⁾ 20 Wend., 210.

⁽⁷⁾ See Angell on Carriers, § 600.

burial, for he was compellable by law to bury his child : *Reg. v. Vann* ⁽¹⁾. *Cur. adv. vult.*

Jan. 23. The following judgments were delivered :

PICOTT, B. There are demurrers to the third and fourth pleas in this case. The action is brought for negligent driving by the defendant's servant, whereby Elizabeth, the daughter and servant of the plaintiff, was injured and killed, and in consequence the plaintiff lost her services, and was put to the expense of burying her.

By the third plea the defendant says that she was killed on the spot, and the first question is, whether this plea affords a good defence in law to an action by a master for damage sustained by reason of the death of his servant. It may seem a shadowy distinction to hold that when the service is simply interrupted by *accident resulting from negligence the master [92 may recover damages, while in the case of its being determined altogether by the servant's death from the same cause no action can be sustained. Still I am of opinion that the law has been so understood up to the present time ; and if it is to be changed it rests with the legislature and not with the courts to make the change.

It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to show that the general understanding had been to the effect laid down by Lord Ellenborough, in 1808, in *Baker v. Bolton* ⁽²⁾. That was, no doubt a *nisi prius* decision ; but it does not appear to have ever been questioned. The ruling was, that the death of any human being could not be complained of as an injury, i. e., as an actionable injury ; and the law as then laid down has found its way into the various text-books treating upon master and servant : 2 Chitty on Pleading (7th ed.), p. 488, n. There was nothing in that case to show that the negligence amounted to a felony, and if, death is caused without criminal negligence or by merely injudicious driving, it would not.

But, in addition to this authority, and the general acquiescence in it for so many years, there is a clear parliamentary recognition and statement that such is the law to be found in the preamble to Lord Campbell's Act, 9 & 10 Vict. c. 93. The language is not confined to cases to which the maxim *actio personam moritur cum persona*, applies, but is perfectly general :

"Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default may have

(1) 2 Den. Cr. C., 325 ; 21 L. J. (M.C.), 39.

(2) 1 Camp., 493.

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caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him."

The remedy is then given to the deceased's personal representatives for the benefit of wife, husband, parent, and child only. Yet it must be manifest that numerous other cases in which special damages of various kinds are sustained (master and servant being one) must have been present to the minds of the framers of the statute, and, if such had been the intention, an express remedy *would have been afforded in cases where proximate special damage resulted from the death so caused.

Several American authorities were also cited which show that the law in America has followed the ruling of Lord Ellenborough (*Filen v. Lexington and Frankfort Ry. Co.* ⁽¹⁾; *Carey and Wife v. Berkshire Ry. Co.* ⁽²⁾), but I do not think it necessary to rely upon these. The result is, in my opinion, that we are not at liberty to disregard the law thus established so long ago and expressly recognized by the legislature, nor in effect to add by the decision of this court another clause to Lord Campbell's Act. For these reasons as regards the loss of service, therefore, I think this action is not maintainable, and the same reason applies also to the expense of the burial.

I think the fourth plea is bad, for the reasons given on the argument, viz., that it only affords a defence, if at all, when the action is brought against the supposed criminal and before prosecution.

BRAMWELL, B. ⁽³⁾ The fourth plea in this case is clearly bad, *White v. Speltigue* ⁽⁴⁾ is in point. Indeed, this case is stronger. There the plaintiff was owner of the books, and it may be said it was in some sense his duty to prosecute the man who stole them; but in this case I see no greater duty in the plaintiff than in any one else to prosecute for the supposed felony.

I think the third plea bad also. The declaration shows that the deceased was the plaintiff's servant, that by a wrongful act, for which the defendant is responsible, she was wounded and killed, and that thereby the plaintiff lost her services and sustained damage which may be real and substantial from the valuable character of the service, prepayment of the wages, or otherwise. The plea admits all this, but says that the wrongful act and death of the servant were at the same moment of time. On this plea it is not alleged that the killing was manslaughter, and as against the defendant it must be taken it was not, for it is not alleged, and there may be a killing under circumstances of sufficient negligence to maintain an action if

⁽¹⁾ 14 B. Monroe, 204.

⁽²⁾ 1 Cush. (Mass.), 475.

⁽³⁾ This judgment was read by Pigott, B.

⁽⁴⁾ 13 M. & W., 603.

death had not ensued, though the negligence is not criminal so as to render the killing manslaughter.

*Now these pleadings show a state of things such that if [94 the loss of service had arisen from the servant being injured, maimed, crippled, or otherwise disabled from work, but not killed, the action would be maintainable (see *Hodson v. Stallybrass* (1)), and the only question is, whether the loss arising from a killing makes any difference. It is important to bear this in mind, as it gets rid of all the suggested difficulties about the impolicy of such action being maintainable, and about the unreasonableness of its being maintainable when an annuitant for a man's life could not maintain an action for the wrongful killing of the *cestui que vie*. Because, supposing we could entertain such a consideration, this action is no more against good policy than one would be where the servant was crippled but not killed; and in the supposed case of the annuitant he could maintain no action for a wrongful crippling or disabling of the *cestui que vie*, whereby he could not pay the annuity, which, indeed, might have been granted to last during good health. Here a relation is shown to exist between the plaintiff and the servant in respect of which, if the master sustains damage in consequence of a wrongful act which injures the servant, the law gives the master a right of action, and the only question is, whether to that general rule there is an exception where the servant is killed. I asked why there should be; no reason was or could be given, except the supposed impolicy; but it was said to be a positive rule of law that where a damage was caused by death no action lay. The burden of showing this is on the defendant, who asserts it. He has to make out an exception to a general rule, and as no reason can be given for it, it seems to me to require very clear authority.

Mr. Prentice, for the defendant, relied, first, on the general rule or maxim, *actio personalis moritur cum personâ*. But that clearly means dies with the person who was to be party to the action as plaintiff or defendant. Dies with the person. What person? It is not any person or every person. If the servant here had lived six months, and during that period service had been lost, this action would clearly be maintainable, though she then died. Further, the maxim is *actio moritur*, which supposes it was once alive, but here the argument is that the plaintiff never had any action. In effect the plaintiff's case is, "You killed my *servant and caused me loss;" and the defend- [95 ant's case is the same, "I did kill her, and therefore never was liable." The sense in which I say the maxim is to be under-

(1) 11 A. & E., 301.

stood is that put on it by Mr. Broom and the many authorities he cites in his *Maxims* (5th ed. p. 904).

Next, Mr. Prentice relied on the recital of 9 & 10 Vict. c. 93, that "no action is now maintainable against a person who by his wrongful acts may have caused the death of another person." And certainly the words are large enough to include this case. But in justice to whomsoever is responsible for it, we ought to see what was the subject-matter being dealt with. When that is done it will appear manifest that such a case as this was not in contemplation. For (it is somewhat strange) the section proceeds to say that wherever the death of a person shall be caused by a wrongful act, and the act "is such as would (if death had not ensued) have entitled the party injured to maintain an action," there the person who would have been liable if death had not ensued shall be liable, "notwithstanding the death of the party injured," that means killed; so that the death is to make a man liable to an action notwithstanding the death. But that the words "party injured" in the phrase "would have entitled the party injured" must mean the same as where they again occur, and, therefore, mean "party killed," the present case would be comprehended in this enactment; for the plaintiff is a "party injured." But it is manifest by s. 2 that the cases the statute is dealing with are cases where no action lay by the representatives of a deceased person to recover damages for his being wrongfully killed, and to this the recital must be limited. Further, with all respect to the legislature and the author of this section, I require stronger authority for the anomaly the defendant contends for, than a loose recital in an incorrectly drawn section of a statute, on which the courts had to put a meaning from what it did not rather than did say: *Franklin v. South Eastern Ry. Co.* (¹)

The next authority relied on was *Baker v. Bolton* (²). Now, certainly, as reported, it favors the defendant's view, for Lord Ellenborough is reported to have said that "in a civil court the death of a human being could not be complained of as an injury, and in this case the damages as to the plaintiff's wife must stop 96] *with the period of her existence." The report is very short, and I am by no means sure of its accuracy. For though the evidence is that the wife assisted in the plaintiff's business, the special damage alleged does not contain any damage to the plaintiff's business, and Lord Ellenborough is reported to have said that the jury could only take into consideration the plaintiff's hurts and the loss of his wife's society and distress of mind till the moment of dissolution. But why was not the plaintiff entitled to recovery for the loss of a month's assistance, and

(¹) 3 H. & N., 211, at p. 214.

(²) 1 Camp., 423.

how was he entitled to recover for distress of mind at all? and especially why up to the time when that distress must have become greatest by the death? This is only a *nisi prius* case, the plaintiff got 100*l.*, and probably was content. No argument is stated, no authority cited, and I cannot set a high value on that case, great as is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument. The reporter puts a most significant query ⁽¹⁾: Why should the answer to it be "Yes," as the defendant contends?

The next authority cited by the defendant is *Higgins v. Butcher* ⁽²⁾. According to that report the plaintiff showed no damage to himself. He said his wife was beaten and died, to his damage. This shows no pecuniary damage to him. Then Tanfield, J., expresses an opinion which was overruled in *White v. Speltigue* ⁽³⁾, and which, as it does not give as the reason that death gives no cause of action, may be said by its silence on that to be in defendant's favor. The same case is reported by Noy ⁽⁴⁾ who states the declaration, and in that report also no damage to the plaintiff is shown. Then the court say the king is to punish a felony, and Tanfield, J. is stated to have said that the action will not lie because the wife is dead, and she ought to have joined in the action, but otherwise if a servant. This is rather an authority for the plaintiff than the defendant. This case is mentioned by Twisden in *Cooper v. Witham* ⁽⁵⁾, as depending on the act of being a felony.

*The remaining authorities are American, not binding [97 on us indeed, but entitled to respect as the opinions of professors of English law, and entitled to respect according to the position of those professors and the reasons they give for their opinions. The first case in date is in 1 Cush. 475, a case in the Supreme Court of Massachusetts. In one of the cases there reported, *Skinner v. Housatonic Ry. Corp.*, an action was brought by a father to recover damages for the loss of his son's service, killed by the negligence of the defendants by an act not felonious. In the other case, *Curey and Wife v. Berkshire Ry. Co.*, an action was brought by a widow to recover damages for the death of her husband, killed in like way. It seems strange that the two cases are supposed to present a single question only for the court, while it is obvious that the case of master and servant raises a different question from that of wife and husband. Nor do I understand why the plaintiff in the father's case, unless there was no damage to the father as master, was nonsuited. That looks as though he had not proved some fact, possibly he

⁽¹⁾ *Quære*.—If the wife be killed on the spot, is this to be considered *damnum absque injuria*, 1 Camp. at p. 494.

⁽²⁾ Yelv., 89.

⁽³⁾ 13 M. & W., 603.

⁽⁴⁾ Noy, 18.

⁽⁵⁾ 1 Lev., 247.

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had not proved damage, for the child was eleven years old only, and it is nowhere said there was any damage. If so, the decision is right. But the judgment is, "If these actions, or either of them, can be maintained, it must be on some established principle of the common law." Now, that is true, and the principle is *injuriâ* and *damnum*, for which the defendant is responsible. The judgment proceeds, "and we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel and we cannot find any. This is very strong evidence that such actions cannot be supported." With great respect, the error of this reasoning is in supposing the burden of proof or argument is on the plaintiff. The general principle is in his favor, that *injuriâ* and *damnum* give a cause of action. It is for the defendant to show an exception to this rule when the *injuriâ* causes death. If the case had been viewed in this way, the reasons of the court tell for the plaintiff. For in my judgment the exception is not upon any established principle of the common law; it is not applied in any adjudged case 98] in the English books; it is not stated in any elementary treatise. They then cited and relied on *Baker v. Bolton* (¹), on which I have commented. They then cite a case in which the contrary was assumed to be the law by all parties and the court, but suppose it may have passed *sub silentio*. I cannot be satisfied with this decision. The reasoning seems wrong and the authority relied on insufficient.

The other case, *Eden v. Lexington and Frankfort Ry. Co.* (²) is in the Kentucky Court of Appeal. This was an action by a husband for the negligent killing of his wife. It is obviously, therefore, not in point. There is no relation of master and servant. If the wife had lived, she must have joined in the action, except to the extent of the husband's pecuniary loss for medicine, &c. But in the judgment the case of master and servant is mentioned. I do not very clearly understand it. The first position was, that the rule that no action lies for a felonious act before prosecution does not prevail in Kentucky. The second is this: "But, according to the principles of the common law, injuries affecting life cannot in general be the subject of a civil action. In other inferior felonies the civil remedy is merely suspended until after the conviction or acquittal of the supposed felon. But for injury to life the civil remedy is considered as being entirely merged in the public office." This was said to be the established common law doctrine in the case

(¹) 1 Camp., 493.(²) 14 B. Monroe, 204.

of *Baker v. Bolton* ⁽¹⁾. It is true Lord Ellenborough is reported to have said that in a civil court death could not be complained of as an injury. But there is nothing else to justify the above opinion, and if this is the authority, *White v. Spettigue* ⁽²⁾ shows its inapplicability here. The judgment proceeds: "The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence that, the cause of action having itself abated, no separate action can be maintained for such damages as are exclusively consequential." I have dealt with this argument before. It is this: "Wrongful death which causes a damage gives no action because it is death which causes it." The judgment proceeds to say "that damages may be recovered up to the time of death, but not beyond." The reason of this seems to be that all injuries affecting *life [99 caused by the misconduct of another person involve the commission of a public wrong, which merges the remedy for all private loss arising after death has occurred and occasioned by it. Why every death caused by misconduct is to be assumed to be a public wrong I know not. The misconduct may be actionable, though not criminal negligence. Nor do I know why, however this may be, the remedy for private loss should merge in it.

I do not like criticising a variety of authorities, and escaping from their general effect by a variety of small differences and objections. But in this case it seems to me that the principle the plaintiff relies on is broad, plain, and clear, viz., that he sustained a damage from a wrongful action for which the defendant is responsible; that the defendant, to establish an anomalous exception to this rule, for which exception he can give no reason, should show a clear and binding authority, either by express decision, or a long course of uniform opinion deliberately formed and expressed by English lawyers or experts in the English law. I find neither. With the exception of a short note of the case of *Baker v. Bolton* ⁽¹⁾ there is no semblance of an authority on this side of the Atlantic, and the cases from the other side are merely founded on that one, and some vague notion of merger in a felony. I may observe that Mr. Smith, in his excellent work on Master and Servant (3d ed. p. 139), assumes as certain that this action would lie.

On the main question, then, I think the plaintiff entitled to judgment; but it seems to me clear that he is entitled to the burial expenses. He says in his declaration that he necessarily incurred expenses in the child's burial. This must be taken to be true, if it can be. Now *Reg. v. Vann* ⁽³⁾ shows he was bound to bury the child if he had the means, which he may have had. On this the judgment in the case of *Eden v. Lexington and Frank-*

⁽¹⁾ 1 Camp., 493. ⁽²⁾ 13 M. & W., 603. ⁽³⁾ 2 Den. Cr. C., 325; 21 L. J. (M.C.), 39.

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fort Ry. Co. (1) is express; so also in *Baker v. Bolton* (2) the plaintiff recovered for loss up to the wife's death. In my opinion the plaintiff is entitled to judgment.

KELLY, C. B. I think the defendant is entitled to the judgment of the court upon the demurrer to the third plea. No decision is to be found in the books from the earliest times by [100] which an action *for this cause has been sustained. No dictum is to be found by any judge or upon any competent authority that such an action is maintainable. All the authority that exists is against it. *Higgins v. Bulcher* (3) shows that a husband cannot maintain an action against one who kills his wife; and — by Tanfield, J., a master has no action against one who kills his servant, though he loses his services. Here, however, the decision proceeds on the ground that the act is a felony; but upon this it may be observed that so would be the killing in the case before the court if the act be such that the negligence makes it amount to manslaughter. In *Baker v. Bolton* (2) the facts are loosely stated, but they seem to show that the action is founded on negligence, and that the plaintiff had been deprived of the assistance, which may mean the services, of his wife. But the decision did not proceed on the ground that the killing was a felony, Lord Ellenborough observing, without any qualification, that, “in a civil court the death of a human being could not be complained of as an injury.” Then we have the American cases, *Carey and Wife v. Berkshire Ry. Co.*, and *Skinner v. Housatonic Ry. Corp.* (4) deciding that no action for loss of services is maintainable where death has been inflicted through carelessness. The case of *Ford v. Monroe* (5) the point not having been taken, and being a *nisi prius* case, is of no authority. Finally, we have the express declaration of the legislature in Lord Campbell's Act that no action lies for damages sustained by the death of a human being, and the language of the preamble shows that it was intended to include more than is provided for by the operative enactments of the statute. Such, then, being the state of the authorities, I agree with my Brother Pigott that we must leave it to the legislature to provide for a case like this, and that we ought not to take upon ourselves to create a new cause of action, which would be to make and not to expound the law.

*Judgment for the defendant on the demurrer to the 3d plea;
for the plaintiff on the demurrer to the 4th plea.*

Attorneys for plaintiff: *Sharpe, Parkers, & Co.*

Attorneys for defendant: *Flux & Leadbitter.*

(1) 14 B. Monroe, 204.

(2) 1 Camp., 493.

(3) 1 Yelv., 89.

(4) 1 Cush. (Mass.), 475.

(5) 20 Wend., 210.

Under the statutes of New York giving the representative of a party wrongfully killed an action against the wrongdoer it is no defence that the death was instantaneous. (*Brown v. Buffalo, etc.*, 23 N. Y., 191; *Whitford v. Panama, R. R.*, 23 N. Y., 465, 486).

So in Connecticut (*Murphy v. N. Y., and New Haven R. R.*, 30 Connecticut,

184; *Andrews v. Hartford, etc.*, 34 Conn., 157).

Otherwise in Massachusetts, (*Hollenbecks v. Berkshire, R. R. Co.*, 9 Cush., 481, *Kearney v. Boston, etc.*, 9 Cush., 108), although the smallest perceptible interval will be sufficient to entitle the representative to maintain the action, (*Banoroff v. Worcester, etc.*, 11 Allen, 34).

Law Rep., 8 Exchequer, 101

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Shipping — Charterparty — Condition that Charterer's liability shall cease.

A charterparty made by plaintiff to defendant contained the following clause: "Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." In an action brought for demurrage at the port of loading:

Held, 1. That the lien extended to demurrage at the port of loading, as well as at the port of discharge. 2. That the ship having been loaded, the charterer could not be sued for demurrage incurred during the loading.

ACTION brought in the Passage Court, Liverpool, to recover five days' demurrage and damages for fourteen days' detention at the port of loading, under a charterparty dated the 17th of January, 1872, by which Perasso, the master of the plaintiff's ship *Tridente*, chartered her to the defendant for a voyage with a cargo of coals from Birkenhead to Genoa, the ship to load "in fifteen working days" (subject to the usual exceptions of frost, etc.); the freight, at 13s. 6d. a ton, to be paid, one-third on signing bills of lading, the remainder on delivery of cargo; "the vessel to be discharged, weather permitting, at the rate of not less than thirty-five tons of coal per working day from the time of her being ready to unload, and ten days on demurrage, over and above her said laying days, at 8l. per day; the vessel to be consigned to the charterer's agent at the port of discharge, paying the usual commission of 2 per cent.; charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage."

The defendant pleaded, amongst other pleas, that the defendant's alleged liability for demurrage and detention was such liability as it was by the said charterparty provided should cease on the ship being loaded.

The vessel arrived at the docks where she was to load on the 12th of February, but the charterer did not commence loading her till the 13th of March, and the loading was not completed

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till the 23d of March. Five days' demurrage had been recovered from the defendant in a previous action brought before the time for demurrage had expired. The present action was brought to recover the remaining five days' demurrage and 102] damage for detention. *A verdict was found for the plaintiff for 127*l.* 10*s.* leave being given to the defendant to move to reduce the verdict by the amount claimed for demurrage.

A rule having been obtained accordingly,

T. H. James and *Kirby*, for the plaintiff, showed cause. The defendant admits his liability for detention, but claims to be freed from his liability for demurrage by virtue of the concluding clause in the charterparty. But the lien extends only to demurrage at the port of discharge; it is not a substitute for vested causes of action. The demurrage accrues *due de die in diem*, and in fact the plaintiff has recovered for five days' demurrage during the loading. How can it be said that the defendant is in any better position with respect to the last five days than the first?

[BRAMWELL, B. The defendant may now say that the plaintiff got what he was not entitled to.]

Pederson v. Lotjnga ⁽¹⁾ and *Christoffersen v. Hansen* ⁽²⁾ are in favor of the plaintiff; and although *Bannister v. Breslauer* ⁽³⁾ is unfavorable to him, that case has been considerably shaken by *Gray v. Carr* ⁽⁴⁾ and *Christoffersen v. Hansen* ⁽²⁾. Here the defendant is not a mere agent, but chartered as principal.

Goldney, for the defendant, supported the rule. The contention of the defendant is supported by authority: *Bannister v. Breslauer* ⁽³⁾ and *Gray v. Carr* ⁽⁴⁾ show that the lien given for demurrage extends to demurrage at the port of loading as well as at the port of discharge; and *Pederson v. Lotjnga* ⁽¹⁾ is no authority to the contrary, for there were there two distinct provisions for demurrage, and it was on that ground that the lien was held only to apply to demurrage at the port of discharge. The lien therefore covers the whole of the claim, and the charterer, for whose liability the lien is substituted, is discharged. In *Christoffersen v. Hansen* ⁽²⁾ the defendant failed because he was sued for damages for detention, in respect of which no lien was given; but it is evident from what was said there, that if there had been a lien the decision would have been 103] different. As to the defendant being *principal, it was so also in *Bannister v. Breslauer* ⁽³⁾, where he was held discharged.

Cur. adv. vult.

⁽¹⁾ 28 L. T., 267; 5 W. R., 290.

⁽²⁾ Law Rep., 7 Q. B., 509.

⁽³⁾ Law Rep., 2 C. P., 497.

⁽⁴⁾ Law Rep., 6 Q. B., 522, at pp. 536, 540, 549.

Jan. 29. The following judgments were delivered :

CLEASBY, B. ⁽¹⁾ [After stating the facts and reading the concluding clause of the charterparty the learned judge proceeded :] It has been for some time not unusual to have a similar clause in charterparties. Such a clause was probably introduced at first in cases where it appeared upon the charterparty that the charterer was only an agent ; and in such cases it has been held that the charterer could not be sued for any delay in loading the cargo which was afterwards provided. In *Oglesby v. Yglesias* ⁽²⁾ and *Milvain v. Perez* ⁽³⁾ the language of the clause no doubt expressly excluded liability for default before and in shipping the cargo. There was no provision in those cases giving the shipowner any corresponding lien for demurrage, or anything in the nature of demurrage, but the Court of Queen's Bench held the owner bound by the clauses as a part of the bargain. The words of discharge in those cases were the same as in the present, viz., that upon the loading of the complete cargo the "liability should cease." Mr. Justice Hill says in his judgment in the latter case ⁽⁴⁾ : "In the present case, according to the pleadings, the defendants have shipped the cargo ; the plaintiffs say that this has been done too late, for that they were bound to do it in regular turn ; but the defendants by express terms, to which the plaintiffs have agreed, have stipulated that their liability shall cease as soon as they have shipped the cargo. We must give the plain effect to these plain terms, and hold that the alleged liability does not attach." In those cases the language was express that the liability should cease in respect of defaults as well before as after the *shipping of the cargo ; and the only [104 bearing of the cases upon the present is, that it was considered that the plain meaning of the words "liability to cease" was, not that the liability should cease to accrue, but that the liability should cease to be enforced. It further appeared in those cases that the charterer was acting as agent only ; but this distinction is not so material, since it may be assumed that there was some reason for this stipulation, and unless the person interested in the goods to be delivered was a different person from the charterer there would be no object in it.

In the present case the language is general, that the charterer's liability should cease, and for the cessation of liability a corresponding benefit is obtained by the shipowner in having a lien

⁽¹⁾ This judgment was read by Cleasby, B. as the judgment of the court (Martin, Bramwell, and Cleasby, B.B.), having been found, was afterwards handed to the reporter.

⁽²⁾ E. B. & E., 930 ; 27 L. J., (Q.B.), 356.

⁽³⁾ 3 E. & E., 495 ; 30 L. J. (Q.B.), 90.

⁽⁴⁾ 3 E. & E. at p. 500 ; 30 L. J. (Q.B.), at p. 92.

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upon a full cargo for demurrage, which he would not have unless expressly agreed. If then the words "liability to cease" are to be read in the same sense as in the cases referred to, the agreement discharges the charterer from demurrage at Liverpool, unless there be something in the charterparty to show that demurrage at Liverpool could not be contemplated, which is certainly not the case.

The case of *Bonnister v. Breslauer* ⁽¹⁾ is very like the present one. In that case it did not appear upon the charterparty that the defendant was acting as agent, and there was no precise provision as to the breaches before and after loading, but the provision was general, that "the charterer's liability was to cease" (the same words as the previous cases and the present one) "when the cargo was shipped, provided that the same was worth the freight at the port of discharge, and the captain was to have an absolute lien on the cargo for freight, dead freight, and demurrage, which he or owner should be bound to exercise." These last words ("which he should be bound to exercise") have no bearing upon the question to which breaches the discharge is to be applicable. It was held that the discharge extended to demurrage at the port of loading as well as the port of discharge, and reliance is placed in the judgments on the word "demurrage" being used in the clause giving the lien, and there being nothing to limit it to demurrage at the port of discharge.

The reasons given for the conclusions arrived at apply to the 105] *present case, and we should adopt the authority of that case unless there be some other decision inconsistent with it. We were referred to two cases on behalf of the defendant: *Pederson v. Lotinga* ⁽²⁾, and *Christoffersen v. Hansen* ⁽³⁾. The first of those cases was decided in the year 1857. The charterparty provided that at the port of loading, after the agreed days for loading, the captain was to receive 5*l.* a day for demurrage, day by day. For the port of discharge the language was different. There was to be demurrage after the laying days at 5*l.* a day. It was considered that the express agreement that the charterer should pay 5*l.* a day, day by day, showed that the clause providing that the owners should rest on their lien for freight and demurrage, must apply to the demurrage, at the port of discharge. The judgments are founded upon the use of the words "day by day" in connection with the payment of demurrage at the port of loading; and there is nothing of that sort in the present case.

In the other case of *Christoffersen v. Hansen* ⁽³⁾ the words were general, that all liability of the charterer should cease as

⁽¹⁾ Law Rep., 2 C. P., 497.

⁽²⁾ 28 L. T., 267; 5 W. R., 29.

⁽³⁾ Law Rep., 7 Q. B., 509.

soon as he had loaded the cargo; and it was held that those words did not relieve the charterer from liability for delay in loading. But in that case no lien was given for demurrage or delay in loading; and this forms a main ground of the judgment of Blackburn and Lush, JJ. Mr. Justice Lush says pointedly ⁽¹⁾, "if there were any provision giving the shipowner an equivalent advantage, that would be a very good reason for his absolving the defendant altogether. But there is no such provision." And he goes on to say that if he gave up the liability of the defendant for past breaches, he would have no remedy except against the foreign principal, not named and perhaps not known.

The claim now in question is not for detention but for demurrage, and the charterparty clearly gives a lien upon the complete cargo for all demurrage, both at the port of loading and of discharge.

Neither of the cases last referred to are at variance with the case of *Bannister v. Breslauer* ⁽²⁾, and we can give effect to the plain meaning of the words, viz., that upon the shipowner acquiring a lien upon the full cargo for freight and de- [106] murrage, all liability of the charterer for both shall cease.

BRAMWELL, B. I think this rule should be made absolute. By the charterparty the charterer was entitled to a certain number of days on demurrage. This was applicable to the loading as well as to the unloading. Some of these days were consumed at the port of loading; and for a portion of them the defendant paid. The present claim is for the residue of the days so consumed at the port of loading. The charter contained a clause that on loading the cargo the charterer's responsibility should cease, the captain having a lien for freight and demurrage. It is impossible to say that this would not give a lien for demurrage incurred as well at the port of loading as at the port of discharge, and so for the demurrage sued for; and it seems impossible to hold that the matters as to which the liability was to cease were not the same as the matters as to which the lien was given. If so the defendant is discharged, and this action is not maintainable. *Bannister v. Breslauer* ⁽¹⁾ is in point; or more than in point if the action there was one, not for an agreed sum for demurrage, but for unliquidated damages for delay in loading; and though that case has been questioned, it has not been overruled, and is binding on us. Nor is *Christoffersen v. Hansen* ⁽²⁾ opposed to this view. On the contrary, the lord chief justice and Mr. Justice Blackburn rely on the

⁽¹⁾ Law Rep., 7 Q. B., at p. 516.

⁽²⁾ Law Rep., 2 C. P., 497.

⁽³⁾ Law Rep., 7 Q. B., 509.

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absence of a lien for the matter as to which the right against the charterer is supposed to be given up. And Mr. Justice Lush's reasoning is very striking. He says (1): "If there were any provision giving the shipowner an equivalent advantage, that would be a very good reason for his absolving the defendant altogether." And so he holds liability for freight is given up, but not liability for damages for delay in loading, because there was a lien for freight, but none for such damages.

Mr. James for the plaintiff suggested that this demurrage was payable *de die in diem*, and that therefore a vested cause of action accrued which it could not be supposed it was intended to give up. The demurrage is not in terms payable *de die in diem*, [107] and it may *be in point of law that none is due till it is known how much will be due. Here however all the days were consumed. But in order to give effect to clear words, we must hold either that the charterer's liability was contingent on his not loading a cargo, or that if a cause of action vested, it was defeasible, and divested on the loading of the cargo.

Rule absolute.

Attorney for plaintiff: *J. B. Wilson, Liverpool.*

Attorneys for defendant: *Forshaw & Hawkins, Liverpool.*

(1) Law Rep., 7 Q. B. at p. 516.

[Law Reports, 8 Exchequer, 107.]

HOLKER v. PORITT and Others.

Jan. 31, 1873.

Easement—Water—Natural and Artificial Stream—Riparian Owner.

A natural stream divided itself at a point called E. into two branches; one branch ran down to the river Irwell; the other passed into a farm-yard, where it supplied a watering-trough, and the overflow from the trough was formerly diffused over the ground, and found its way ultimately into the Irwell. The second branch appeared to have been made by artificial means, but was of immemorial age.

In 1847 W., the owner of the land on which the watering-trough stood, and thence down to the Irwell, collected the overflow into a reservoir, and conducted it by a culvert to a mill situated on the banks of the Irwell.

In 1865 W. became owner of all the rest of the land through which the second branch flowed.

In 1867, he sold the mill, with all water rights, to the plaintiff.

In an action brought by the plaintiff against a riparian owner on the stream above E. for obstructing the flow of the water:

Held, that the plaintiff was entitled to maintain the action.

DECLARATION: That the plaintiff was possessed of certain land, and was entitled to the flow of certain streams or watercourses

to and through the said land, and the defendants obstructed and diverted the water of the said streams or watercourses from the plaintiff's land.

The only plea on which anything turned was a plea traversing the plaintiff's title to the flow of the said streams or watercourses.

The cause was tried before Willes, J., at the Manchester Summer Assizes, 1872, and the following facts were then proved :

From time immemorial two streams flowing down to a piece of *open ground called Buckden Ginnell, there joined, [108 and the united stream passed on through the Broadwood Edge estate to a point at the back of Broadwood Edge farm-house, marked E on the map used at the trial. There it divided, and part flowed on to Buckden farm, and thence to the river Irwell; and part to a farm called Silas Wilson's farm. The diversion of the stream at E appeared to have been artificially made, being effected in part by stones placed across the brook (called a "feather"); but there was no evidence when or by whom this was done, and so far as could be judged from the appearance of the stones, they had been there for many years.

The portion of the stream which flowed on to Silas Wilson's farm formerly passed into a farm yard, where it supplied a watering-trough for cattle, the overflow passing away in no defined course, and ultimately finding its way, by ooze and percolation, into the river Irwell.

In 1845 a Mr. Walker became owner of the Lumn Hall estate, which extended from Broadwood Edge farm to the river Irwell. The estate comprised a cotton mill situated on the banks of the Irwell, which Walker proceeded to alter into a paper mill, and for the purpose of supplying it with water he made a reservoir to collect the overflow at the watering place on Silas Wilson's farm, and thence constructed a drain carrying the water down to the mill, where it was stored in lodges for use.

This was done in the year 1847.

In 1865 Walker purchased the Broadwood Edge estate.

In 1867 he conveyed to the plaintiff the Lumn paper mill, with a right to all springs, wells, and streams of water in, under, or upon, or arising or issuing in, from, or out of all or any part of the lands comprised in the Lumn Hall and Broadwood Edge estates, reserving to himself, his heirs and assigns, a supply of water for domestic and agricultural purposes.

All the lands traversed by the water were copyhold.

The defendant was owner of the land traversed by the two streams which united in Buckden Ginnell, and the act complained of was an obstruction by him of those two streams, the effect of which was that the water was thrown over the surface

of the ground instead of running down to Wilson's farm, and so on to the plaintiff's mill.

[109] *A verdict was taken for 40s. damages, leave being reserved to the defendant to move to enter the verdict for him if the plaintiff was not entitled to maintain this action. A rule having been obtained accordingly,

Holker, Q.C., *Kemplay*, Q.C., and *Gorst*, showed cause. There is nothing in principle to prevent the plaintiff from owning the right he claims. All the arguments used in favor of the plaintiff in *Nuttall v. Bracewell* ⁽¹⁾ are applicable here, and that case is an authority for the present plaintiff. Indeed, the present case is stronger, for the branch which runs down from E to the trough is of a less artificial character than the goit in *Nuttall v. Bracewell* ⁽¹⁾, and is of much older date. It cannot be denied that the owner of that branch could have sued for an obstruction; equally the owner of any part of that branch could have sued. If so, then the owner of the land where the water emptied itself from the trough and wasted itself on the ground was at liberty to collect the water into a channel, and the owner of that channel, which was but a continuance of the watercourse, can sue for any interference with the natural flow. If it is said that in *Nuttall v. Bracewell* ⁽¹⁾ the plaintiff was a riparian owner on the main stream, the answer is, that it is plain he sued in respect of the goit, and as entitled to the passage of water down it, and in respect of this he was not a riparian owner on the stream. It would be as relevant to say here that the plaintiff is a riparian owner, as in truth he is, namely, upon the banks of the Irwell, into which both streams run. On the other hand, the case is plainly distinguishable from *Stockport Waterworks Co. v. Potter* ⁽²⁾, on the same ground on which that case was distinguished in *Nuttall v. Bracewell* ⁽¹⁾. The plaintiffs there were not the owners of any land to which a natural stream ran, nor did they claim the right for any use connected with the land; but they claimed a licence or right in gross to take water from the stream for sale to and consumption by strangers. Here, on the contrary, the plaintiff comes within the ordinary description of grantee of a water right appurtenant to land. They also referred to *Proud v. Hollis* ⁽³⁾.

[110] **Pope*, Q.C., *Herschell*, Q.C., and *Baylis*, in support of the rule. The case is really undistinguishable from *Stockport Waterworks Co. v. Potter* ⁽²⁾, which is a binding authority, and is right both on principle and on grounds of convenience. The right which a riparian owner has is only to use the water of the stream for ordinary purposes, or, by grant or prescriptive

⁽¹⁾ Law Rep., 2 Ex., 1.

⁽²⁾ 8 H. & C., 300.

⁽³⁾ 1 B. & C., 8.

right, for extraordinary purposes: *Miner v. Gilmour* ⁽¹⁾. Walker, therefore, being owner of the land at E., could, no doubt, have maintained an action for any obstruction to or abstraction from the main stream on the banks of which he was owner. But this right was a right which he had as riparian owner, and which he could not retain if he ceased to be such, nor confer on any person who was not a riparian owner. The right to the water for ordinary purposes is attached by law to the ownership of lands on the banks of a stream, and is in its nature incapable of being communicated to others; the right to its use for extraordinary purposes is a supplement to the ordinary right, it is founded upon the same circumstance, the possession of riparian land, and can only be acquired by the same persons who can possess the ordinary right. In *Stockport Waterworks Company v. Potter* ⁽²⁾, which is the only case where a right of this kind has been claimed by a stranger under a grant, it was held that the right could not be supported. The reason of convenience is also strongly in favor of this view, for if such a right may be acquired by one, it may be acquired by five hundred persons, and if all such persons are to be treated as riparian owners, the liabilities of the true riparian owners higher up will be indefinitely increased, and no one of them can even alter in any degree the bed of the stream passing through his land without being liable to an action at the suit of every one of these grantees: *Bickell v. Morris* ⁽³⁾. Again, the right of a riparian owner is to do whatever he will with the stream, including extraordinary uses, subject only to the right of those below him to object if his acts materially diminish the flow coming to them: *Simpson v. Hoddinott* ⁽⁴⁾; and in this respect also his opportunity of availing himself of that right will be indefinitely curtailed by allowing of the creation of numerous derivative *rights of this nature. And although it is true that the [111] possession of any portion of land, however small, on the banks of a stream will entitle the owner to riparian rights, it has never been decided that it will entitle him to the use of the water for the purpose of lands lying at a distance from the stream, and separated from the riparian land by intervening lands belonging to other owners; still less that it will entitle him to the use of the waters for purposes not really connected with such land as land. But even if it did, the necessity of possessing some riparian land would materially diminish the inconvenience which would be caused by the possibility of creating an indefinite number of water rights.

⁽¹⁾ 12 Moo. P. C., 131, at p. 156.

⁽²⁾ 3 H. & C., 300.

⁽³⁾ Law Rep., 1, Sc. Ap., 47.

⁽⁴⁾ 1 C. B. (N.S.), 590, at p. 611; 26 L. J. (C.P.), 148.

It is not possible to regard the watercourse, as it existed from E. to the trough, as a natural stream; it is evidently artificial in its origin, and the fact that it is an open cut does not make it of a different character from a supply drawn from the stream by pipes, as in *Stockport Waterworks Co. v. Potter* ⁽¹⁾. In each case the water would flow down naturally by the law of gravitation; and the fact that after supplying the purposes for which it was required at the cattle trough the stream ceased, and the overflow was allowed to waste itself on the surface, shows that it cannot be treated as a natural stream. Lastly, even assuming such a right as the plaintiff claims to be possible, it could only be acquired by prescription, and to this there are two answers; first, the conveyance of the water by an underground duct is not such an open exercise of enjoyment as will create a prescriptive right; secondly, the higher owners were in no way affected by the use, and therefore could not interfere; the only way in which they could have interrupted the user would have been by stopping the water, which would have exposed them to actions by all lower riparian owners.

In fact, there are only four ways in which the plaintiff can possibly claim the use of the water; 1, as riparian owner; 2, by his possession or taking of the water; 3, by grant; and 4, by prescription. As to the first, he is not a riparian owner, and therefore cannot claim as such. As to the second, *Laing v. Whaley* ⁽²⁾ shows that such a claim cannot be supported on that ground; see per Bramwell, B., in *Stockport Waterworks Co. v. [112] Potter* ⁽³⁾. As to the third, the *Stockport Waterworks Case* decides that no such grant can give rights as against any one but the grantor; nor can any such grant be presumed here. As to the fourth, it is clearly agreed by the whole court in the last mentioned case (including Bramwell, B., who dissented as to the possibility of a right by grant), that such a right cannot be gained by prescription. *Nuttall v. Bracewell* ⁽⁴⁾ is clearly distinguishable on two grounds; first, the plaintiff was a riparian owner, and therefore capable of acquiring rights which a non-riparian owner cannot, and in fact he claimed as riparian owner, which the plaintiff here does not; secondly, the goit there was equivalent to a natural stream, and the case was therefore like the case put in the *Stockport Waterworks Co. v. Potter* ⁽⁵⁾, of a stream being made into two streams, which cannot be said in this case.

They also contended that, the land being copyhold, no such prescriptive right could be acquired.

⁽¹⁾ 3 H. & C., 300.

⁽²⁾ 3 H. & N., 675, 901; 26 L. J. (Ex.), 327; 27 L. J. (Ex.), 422.

⁽³⁾ 3 H. & C., at p. 318.

⁽⁴⁾ Law Rep., 2 Ex., 1.

⁽⁵⁾ 3 H. & C., at p. 327.

KELLY, C.B. This rule must be discharged. The circumstances of the case, and the nature of the right claimed by the plaintiff, are as follows: From time immemorial a stream of water has existed, on a portion of whose banks the defendants are possessed of land, and are therefore in respect of that land riparian proprietors. From the defendants' land the stream runs down to a point called, in this case, E., where a division takes place, and the stream branches out into two streams, the one running down till it reaches the river Irwell, the other running through Broadwood Edge farm to a place where formerly it emptied itself into a trough, and the overflow, without, so far as appears, forming any stream visible to the eye, diffused itself over the surface of the ground, and discharged itself by percolation through the surface, or found its way by small rills into the Irwell.

The plaintiff is possessed of land near to the Irwell, and of works, which are described as a paper-mill, all which he has purchased of one Walker; and when we inquire into Walker's title, we find that he was at the time of the sale the proprietor of a quantity of land which comprised both banks, and presumably therefore the bed, of the second branch of the stream from E. through the *Broadwood estate to the site of the [113 watering trough, and which continued on till it reached the Irwell.

There is no evidence as to when or how the branch of the stream which runs through Broadwood Edge came into existence. There is evidence on which a jury might find that it had existed from time immemorial. It is true that some stones, described as a "feather," are placed at the point of division, and it might possibly be inferred that these stones were placed there at some remote period to divide the stream, and create the branch which has now existed as far back as living memory goes. But these stones themselves appear to be of ancient date, and, if the cause of the division of the stream, must have been placed there at a very remote period.

We must, therefore, take up the case at the period of twenty-five years ago when Walker, who was then the proprietor of the land on both sides of the stream up to the point where it leaves Broadwood Edge estate, including the land on which the trough was situated, and the land further on towards the Irwell, determined to collect the overflow from the stream into a reservoir, and conduct it thence in a single stream into the land which abuts on the Irwell. First, then, had he a right to do this? and, secondly, if so, what was the effect of his act? There is one fact of very important bearing on the argument on both sides. Nothing that Walker did or could have done

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could take a single cubic inch of water beyond what naturally flowed out of the stream at the spot where the reservoir was made. Therefore, whatever were the rights of the defendants, Walker had not done anything which could prejudice them, or the rights of any riparian proprietors higher up the stream. If the stream had continued below the trough, and had passed into other person's lands, and Walker had done any act to diminish the quantity of water that flowed to those lands, he might have incurred a liability; but taking the water at the trough could not have interfered with any one, because the water reached the land of no other proprietor. What, then, was the nature of his act? He found the stream entering his land as a stream, and at the trough ceasing to have that character. It did not, indeed, altogether physically cease, because the overflow was dispersed, for the most part sank into the ground, and the residue in a greatly diminished quantity found [14] its way into the Irwell. That was a state of things injurious to the land, and to the health of those who might reside there, and Walker, intending to put an end to it, collected the water into a reservoir, and constructed a tunnel to carry the water out of the reservoir till it reached what are now the plaintiff's premises.

What rights, then, were acquired by Walker? If the defendants had, whilst Walker was still the owner of these premises, taken out of the stream unduly large quantities of water from the spot where their land abuts upon the stream, it is not disputed that Walker might have brought an action. Nor is it disputed that now the owner of the land on the stream between E. and the trough might for any act diminishing the quantity of water have brought an action. It is said, however, that the plaintiff is not the proprietor of any land abutting on the stream, and, therefore, not being a riparian proprietor, is not entitled to bring this action.

But I am of opinion that he or any one who was owner of the land through which this stream flowed, after the works which I have described were effected by Walker twenty-five years ago, and who was deprived of any of the water which from the time of those works being constructed he had enjoyed, would be entitled to maintain an action just as if they had been proprietors on the bank of a natural stream. And on this ground. What in the contemplation of law is the nature of this artificial stream or tunnel? Suppose that instead of a tunnel conveying the water into what are now the plaintiff's premises Walker had cut an open drain, and so made a stream visible on the surface passing through his land, and on into the Irwell. If he had done so, I am of opinion that he, or any one claiming

under him through whose property this open stream passed, would have been as much entitled to the water running along it as if he had been the owner of land on the bank of the stream between E. and the trough. It would have been a mere continuance of the stream. But the cases upon this subject establish the proposition that there is no difference in the contemplation of law between a stream visible to the eye, and a stream conducted through a tunnel, nor any difference in the rights which may be acquired in them respectively. If this is so, on what ground is there any difference between the rights of the plaintiff in the stream which now flows to him through a tunnel, *and the rights which he would have had in an [115 open stream passing into and through his land? I think there is none. And it is right to state, in order that no question may be raised on this point, that this stream has been enjoyed for more than twenty years. There may be something in the argument that the right to have a flow of water through his property under these circumstances can only be acquired by one who has enjoyed it for twenty years; but if that is so, any doubt on that point is here removed, for more than that period of enjoyment has elapsed.

It is not necessary to refer in detail to the cases which have been cited. This case is clearly distinguishable from the case of *Stockport Waterworks Co. v. Potter* ⁽¹⁾. If there were no other point of distinction it would be enough to say that there a diversion of water was made from the stream by a person who had no power to make it. It was not a taking by a riparian proprietor out of a stream for his own purposes, but the making of a new stream and carrying away the water in immense quantities for consumption elsewhere, the water being never returned into the same stream, but being taken to a place where the person taking it claimed to apply it entirely to his own purposes. That case was, therefore, quite different from the present one. On the other hand the case of *Nuttall v. Bracewell* ⁽²⁾ is, I will not say on all fours with the present case, but is not distinguishable from it on principle. It is enough to refer to the concluding words of Channell, B. ⁽³⁾, to show that the present case is within it. I should also refer to the judgment of Bramwell, B., in that case, but that as he dissented from the judgment of the court in *Stockport Waterworks Co. v. Potter* ⁽¹⁾ it might be supposed that his mind was somewhat influenced by the view he had there entertained. Channell, B., concluded his judgment thus: "I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for it is a natural stream or flow of water, though

⁽¹⁾ 3 H. & C., 300.⁽²⁾ Law Rep., 2 Ex., 1.⁽³⁾ Law Rep., 2 Ex., at p. 14

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flowing in an artificial channel. It may be that the case of an entirely artificial stream, as one flowing from a mine for instance, would be different; but that an artificial stream may be on the same footing as a natural one, as regards the right of [116] riparian *proprietary, is held in *Sutcliffe v. Booth* (1).” On the ground, therefore, that this stream, though artificial in the sense that its bed was constructed by the hand of man and not by any natural agency, and that it flows not as a stream visible to the eye, but is conducted by means of a tunnel to the plaintiff’s works from the spot where as a stream it formerly ceased, yet is a stream which all who possess property through which it flows are entitled to use, and of which they can only use so much as actually flows along the branch, I am of opinion that the plaintiff is entitled to maintain this action for the disturbance which the defendants’ act has caused.

MARTIN, B. I am of the same opinion. I understand it to be admitted that Walker could have maintained an action for this disturbance, but it is contended that the plaintiff cannot. What, then, were Walker’s rights? He had a natural stream of water flowing from E. to the trough; a stream as to which no one can tell when it began, and which must therefore be treated as a natural stream. A man who has a natural stream of water flowing through his land has, in ordinary cases, a right to its flow, subject only to the ordinary use of the same by higher owners. They may use it for ordinary purposes, such as drinking, washing, watering their cattle, and so forth, and, perhaps, if it comes down to the lower owner materially diminished by that use, he must submit; ordinarily, however, this is not the case. Walker, therefore, was entitled to have the stream flow in its ordinary course down to the place where the trough stood, and beyond which, twenty-five years ago, it was not continued in a defined channel to the Irwell, but was allowed to dissipate itself over the surface of the ground. Now that state of things was exactly as if a stream lost itself in a marsh or swamp, a haunt for snipe and wild fowl, but not turned to any agricultural purpose. And I am of opinion that if a proprietor in such a case expends his labor in cutting a course for the water, he acquires a right analogous to that which he would have if that course had been a natural stream and that no distinction can be made between a natural stream and a water course made to drain land and to carry down the water to its [117] *natural destination. But whether any such distinction can be made or not, there has here been an enjoyment of the

(1) 32 L. J. (Q.B.), 136.

course for twenty years, which will give the right to its enjoyment if it is necessary to rely on that.

An objection has been taken by Mr. Baylis that this land was copyhold, and that no easement can be acquired in copyhold by an enjoyment of any duration, however long. I will not go into that question, for my impression is that when a man cuts through a marsh a course for water, the stream is analogous to a natural stream.

If so, then Walker had a stream analogous to a natural stream flowing down to his works. Then the question is, can a person having such a right, assign it? What reason can be alleged why he cannot? He could assign a right of way in the like circumstances; why then cannot he give a right to use the water? If he can assign the whole of his land to which such a right is attached, why cannot he assign a portion with the same rights? I think the defendant has wholly failed to show any reason why he cannot. It is objected that the stream is stopped in a reservoir, and then carried by a tail goit into the river. That may give those below the plaintiff (if any) a right to complain, but it can give the defendants none. The plaintiff had a right to use the water to any extent, provided those below, whose right he interfered with, did not complain.

I cannot see that the case of *Stockport Waterworks Co. v. Potter* (1) has any bearing on this case.

PIGOTT, B. I am of the same opinion, and I think the argument of the defendants fails altogether. If there were here something equivalent to the end of a pipe inserted in the stream by a riparian proprietor, and the water were passed on to a licensee or assignee of the pipes, the facts would somewhat resemble those in *Stockport Waterworks Co v. Potter*. (1) But that is not so. Here, on the contrary, there is a branch of the stream at E., where the main stream divides into two currents. There is no evidence as to the precise period when the plaintiff's branch was first made; but it was done beyond the time *of [118 memory. There is, then, no ground for saying that this is a diversion of the stream, it was the stream itself which passed on from E. to the trough. Then, Walker, being the proprietor of the land lying on this branch, finding the water dissipating itself beyond the trough, collected it into a reservoir, and conducted it in pipes to the land which is now owned by the plaintiff, where it was carried on to the Irwell. In that state of things the water continued to pass along the new course till the land was sold to the plaintiff. Thus the plaintiff became possessed of this land with what is equivalent to a natural stream

(1) 3 H. & C. 300.

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of water running through it. What had been a stream which could scarcely be traced had become a defined stream. Why, then, is not the plaintiff entitled to maintain this action for the obstruction by the defendants of the water which would naturally run along that channel? *Nuttall v. Bracewell* (1) shows that by turning a natural stream into a cut, you do not change the character of the right. The proprietor does not claim his right in a different way, but he claims the use of the water as the proprietor of the land in, over, and through which there passes a natural stream, which has, by the expenditure of labor, been turned into an artificial channel. By taking away this water the defendants take away from the plaintiff what is perhaps as valuable and useful as any part of his estate. The defendants could not have abstracted the water as against Walker; and if so, why is the plaintiff not entitled to sue, who claims through Walker? He claims the water not as an easement, but as owner of the land through which it passes.

As to *Stockport Waterworks Company v. Potter* (2) I think it has no application to this case.

Rule discharged.

Attorneys for plaintiff: *Milne, Riddle, & Mellor.*

Attorneys for defendants: *Woodcock & Rylands.*

(1) Law Rep., 2 Ex., 1.

(2) 3 H. & C., 300.

[Law Reports, 8 Exchequer, 119.]

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*MITCHELL v. HOLMES.

Jan. 24, 1873.

Payment—Payment to Administrator—Payment prior to Letters of Administration being granted.

An annuity was directed by will to be paid to H. whilst living, by equal half-yearly payments, and a proportionable part of the annuity to be computed to the day of H.'s death, from the last preceding day of payment "to the executors and administrators" of H. A proportionate part, after H.'s death, was paid to the husband of H., but before he had administered to her estate, and he died without having done so, leaving his son his executor. The son administered to H.'s estate, and claimed the proportionate part of the annuity:

Held, that the payment to H.'s husband was not a good legal payment, and that the son might recover the money.

Mitchell v. Moorman (1 Y. & J. 21) followed.

Semble, per Kelly, C. B., that the payment was not a good equitable payment

DECLARATION in replevin.

AVOWRY, stating that one William Gibbons, being seized in fee of certain lands, by his will devised those lands to Edward Gibbons and his heirs, charged with the payment of an annuity of 20*l.* to one Jane Holmes for her life, which annuity the testa-

tor directed should be paid by "equal half-yearly payments; that is to say, on the 30th day of May and on the 23d day of November in each year, the first half-yearly payment to be made to Jane Holmes, if living, on such of the said days of payment as should first happen after the end of six calendar months next after his decease, and to the executors or administrators of the said Jane Holmes, a proportionable part of the said annuity to be computed to the day of the death of the said Jane Holmes from the then last preceeding day of payment. And the testator further directed that in case the annuity should be in arrear for forty days, it should be lawful for Jane Holmes and her assigns to enter and distrain. That William Gibbons died, leaving Jane Holmes surviving, who then became entitled to the annuity devised, and afterwards Jane Holmes died, and the defendant became her administrator; and there was then due to the defendant, as such administrator, 8*l.* 17*s.* 5*d.*, being the proportionable part of the said annuity to be computed to the day of her death; that the same remained in arrear for more than forty days; wherefore the defendant well averred, &c.

Plea: *riens in arrear.*

*Issue.

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[There was another avowry of a distress in respect of 137*l.* 0*s.* 9*d.*, to which the Statute of Limitations was pleaded. The plaintiff replied a written acknowledgment, and upon this issue the defendant was successful.]

At the trial before Willes, J., without a jury, at the Durham Summer Assizes, 1872, it appeared that William Gibbons having, upon the 9th of April, 1821, made his will in the terms set forth in the avowry, died on the 7th of August, 1826. George Holmes, husband of Jane Holmes, the annuitant, and father of the defendant, was sole executor, and proved the will. Payments on account of the annuity were made from time to time in Jane Holmes's lifetime. She died intestate, on the 24th of April, 1866, and at that time 8*l.* 17*s.* 5*d.*, was the proportionable part of the annuity due to her administrator, computed as directed by the will, from the last day of payment of the half-yearly instalment to the day of her death.

This sum was paid by the plaintiff to George Holmes who, however, had not then and never did take out letters of administration to his wife's estate. He died on the 10th of March, 1869, and the defendant was his executor, and also administered to the estate of Jane Holmes. It was not disputed that the distress had been levied on the proper land, and the only question in dispute was whether the payment to George Holmes, he never having taken out administration to his wife's estate was a good payment. If it was, there was nothing in arrear. The learned

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judge was of opinion that the payment was not a good one, and directed a verdict for the defendant. He refused to allow the addition of an equitable plea to the avowry, having considerable doubt as to whether the payment would be good in equity. At the same time he intimated that he did not desire to prejudice any application to amend which might afterwards be made to the court upon motion for a new trial.

A rule was obtained in Michaelmas Term last for a new trial, on the ground of misdirection in this, that the judge ought to have held the payment to George Holmes sufficient, and for an amendment of the pleading if necessary, by adding an equitable plea to the avowry.

[21] **Kemplay*, Q.C., and *John Edge*, showed cause, and relied upon *Mitchell v. Moorman* ⁽¹⁾.

[They were stopped.]

Crompton, in support of the rule, contended that the payment to the defendant's father was a good legal, or, at all events, a good equitable payment. Although no letters of administration were taken out by the father, a court of equity would not permit the defendant, who represented both the father's and the mother's estate, to say that such payment had not been made: *Curt v. Rces*, cited in *Squib v. Wyn* ⁽²⁾; *Attorney General v. Partridge* ⁽³⁾; *Bells v. Kimpton* ⁽⁴⁾.

KELLY, C.B. This rule must be discharged. The sum avowed for never belonged to Jane Holmes at all, but was made payable under the terms of the will of Gibbons to the "administrator" of Jane Holmes. The defendant's father, therefore, the husband of Jane Holmes, would have been entitled to the money, and able to give a valid discharge for it as soon as he had administered to his wife's estate. But he never took out letters of administration and died without having done so. After his death the defendant did administer to his mother's estate, and thus, under the terms of the will, became entitled to this money. It is said, and we must assume it as proved, that an equivalent sum was paid to the husband, the defendant's father. And it is argued that because the defendant is not only his mother's administrator, but his father's executor, a payment to the father, although he had never administered to his wife's estate, is a payment which the defendant must recognize. This is certainly not so at law, and with the position of the parties in equity, we cannot, upon these pleadings, deal; and we do not think the case one in which we ought to amend. I must add, however, that in equity also, I think the defendant's contention would fail, but it is not necessary to decide this point.

⁽¹⁾ 1 Y. & J., 21.

⁽²⁾ 1 P. Wms., 381.

⁽³⁾ 3 H. & C., 193; 33 L.J. (Ex.), 281.

⁽⁴⁾ 2 B. Ad., 273.

MARTIN, B. I am of the same opinion. The case cited by Mr. Kemplay is precisely in point. At law, therefore, the defendant is entitled to our judgment. And into his position in equity it is *unnecessary to enter. At this stage the [122 pleadings ought not to be amended.

PIGOTT, B., concurred.

Rule discharged.

Attorneys for plaintiff: *Rogerson & Ford.*

Attorney for defendant: *John Tucker.*

Payment to one who is subsequently appointed an executor or administrator is good, for when the appointment is made it relates back to the death of the creditor. *Matter of Falkner*, 7 Hill, 181; 1 How. Prac., 207; *Priest v. Benson*, 2 Hill, 225.

And payment to a foreign executor or administrator is good there being none in the state where the debtor resides. *Vroom v. Van Hune*, 10 Paige, 549; *Broen v. Broen* 1 Barb. Chy. Rep., 189.

So a promise to one who is subsequently appointed is sufficient to entitle him to maintain an action thereon. *Bodger v. Bodger* 10 Excheq., 333.

And so a payment on a debt to the widow of a creditor, before she has taken out letters of administration, will take the debt out of the statute of limitations so as to enable her to maintain a suit on it as administratrix upon taking out letters. *Townsend v. Ingersoll* 12 Abb. Prac. Rep., 354.

The husband, at common law, could, after the death of the wife, receive payment of a debt due to her and discharge the same without taking out letters of administration. He took her personal property as husband and not as her representative. *Ransom v. Nichols* 22 N. Y. 110; *Ryder v. Hulse*, 24 N. Y. 372.

Although he could take out letters upon her estate as administrator pro-

perly when he would not be liable upon a bond given to a third person in trust for her. *Husted v. McChesney*, 2 Keyes, 92.

Although the representative of a married woman has been held in Michigan entitled to maintain an action against the husband to compel him to assign securities held in trust for the wife. *Leland v. Whittaker*, 23 Mich. 324.

In *Humphreys v. Bullen*, West's Chy. R., 66, 1 Atk., 458, it was held the husband was entitled, as against all other persons, to administer upon the estate of his wife. The first husband having left his wife a legacy, which neither she nor her second husband received during the life of either, the second husband having survived her and administered upon her estate but died before receiving the legacy, held that the representative of the second husband having collected the legacy the administrator of the wife could not recover it from him as if he recovered it, the recovery would be for the representative of the husband. In the principal case the arrears after the last pay day were specially made payable to the wife's representatives and never were payable to her or any one except her representative, legally appointed; so that payment to the husband who never took out letters was not a valid payment.

[Law Reports, 8 Exchequer, 122.]

Jan. 25, 1873.

FEATHERSTON V. WILKINSON and Another.

Contract — Measure of Damages — Evidence — Onus of Proof.

The defendants, by charterparty, agreed with the plaintiff that their ship should, at a specified time, load 1300 tons of coals in the river Tyne, to be carried to Havre for the plaintiff. They broke their contract, and the plaintiff had, in consequence, first to hire other vessels at an advanced freight, and, secondly, to

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buy the 1300 tons of coal at an enhanced price. He was unable, according to the custom of the colliery trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage, the defendants admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in price at the pit's mouth was not disputed; but it was not directly proved that there had been an equivalent rise at Havre.

Held, that the fact of the plaintiff having paid the additional price was *prima facie* evidence of damage to that extent, and entitled him, in the absence of evidence to the contrary, to recover.

DECLARATION, that the plaintiff and defendants agreed, by charterparty, that the defendants' ship, the Edith Emily, should, with all convenient speed, sail to Northumberland dock, on the river Tyne, and there, during the first or second week of January, 1872, load and receive on board 1300 tons of coal, which she should carry to Havre, and there deliver on payment of freight; that all conditions, &c., were fulfilled, yet the defendants made default, and the ship was not ready to load during the first or the second week in January, 1872, whereby the plaintiff was put to expense in chartering other ships and buying coal to load them with.

The defendants paid into court 27*l.* 10*s.*, being the increased freight which the plaintiff had to pay, and denied all further liability.

[23] *At the trial before Brett, J., at the Northumberland Summer Assizes in 1872, the following facts were proved:

The plaintiff, a Newcastle merchant, on the 14th of December, 1871, entered into a charterparty with the defendants, shipowners at West Hartlepool, and owners of the Edith Emily, upon the terms set forth in the declaration. After the execution of the charterparty, the plaintiff went to the offices of the Bebside Colliery, at Newcastle, and verbally agreed with the manager there to take 1300 tons of coal at 10*s.* 6*d.* a ton in the first or second week of January, 1872. The Edith Emily was accordingly put on the "turn book" of the colliery for that time. Owing to the defendants' default the vessel lost her turn, and it was impossible, according to the custom prevailing in the Tyne of loading ships "in turn," for the plaintiff to obtain his coal until he had substituted vessels to carry it. As soon as was practicable, he loaded 1300 tons of coal in two other ships, instead of the Edith Emily, at an advanced freight of 27*l.* 10*s.*, paying also, 1*s.* 6*d.* a ton extra for the coal. No evidence was given that he was under any contract to deliver at Havre at the lower rate, and it was contended by the defendants that they were not liable for the higher price which the plaintiff had to pay for the coal, inasmuch as he was in possession of an article which was proportionately more valuable.. Although the price of coal at Newcastle was admitted to have

risen, it was not proved directly that there had been a corresponding rise at Havre. A verdict was entered for the plaintiff for 97*l.* 10*s.*, the total additional price which he had to pay for the coal, with leave to move to enter a verdict for the defendants, the court to draw inferences of fact. A rule was obtained accordingly in Michaelmas Term, 1872, on the ground that the damages sought to be recovered were too remote, and not in point of law recoverable.

Holker, Q.C., and *G. Bruce*, showed cause, and contended that the plaintiff was entitled to recover the advanced price of the cargo; the mere circumstance that coals had risen at the pit's mouth was not enough to rebut the *prima facie* evidence of loss. If the defendants had desired to show that the 97*l.* 10*s.* had not really been lost, they should have called evidence to prove that the *plaintiff either had or could have realized at [124 Havre an equivalent increase.

Herschell, Q.C., in support of the rule. The plaintiff, by showing merely the fact that he paid more for the coal, has not shown damage. He should have shown, also, that he could not realize an equivalent profit.

[*KELLY*, C. B. The coal might have been for his own consumption.]

If so, he should have proved the fact. The proper measure of damage is the difference of freight, and to charge the defendants with the enhanced price of the cargo is a novel head of damage upon breach of such a contract as the present one. No subcontract by the plaintiff to deliver at the lower price was proved. Indeed evidence of such a contract would have been worthless unless the defendants were shown to have had notice of the fact: *Hudley v. Barendale* (¹). It is true that the defendants offered no evidence of the rise in coal at Havre. But the rise at the pit's mouth was not disputed, and the proper inference to be drawn by the court is that a corresponding rise at Havre had taken place.

KELLY, C. B. I think this rule should be discharged. The plaintiff contracted with the defendants that they should be ready with their ship, the *Edith Emily*, to receive a cargo of coal on a certain day. The defendants broke their contract, and the consequence was that the plaintiff was obliged not only to charter vessels at an advanced freight, but also to buy coal at a higher price, the total difference in price amounting to 97*l.* 10*s.* Of this sum, therefore, he was a loser, unless evidence is offered to show that in fact there neither was nor could

(¹) 9 Ex., 341; 23 L.J. (Ex.), 179.

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be any loss. *Primâ facie* the evidence entitles him to recover that sum.

But it is contended, on the part of the defendants, that because the coal bought was worth the extra 1s. 6d. a ton given for it, there was no loss, inasmuch as although the plaintiff had paid 97l. 10s. more than he would have paid if the defendants had performed their contract, he could, upon re-sale, get back the extra price. But there was no satisfactory evidence given [25] as to this *point. Coal had risen at the pit's mouth. It does not follow that the same rise had taken place at Havre. If it had, that circumstance might diminish the damages; but I think that the defendants ought to have given evidence upon the subject, if they desired to rely upon a rise at Havre. I agree that it is questionable, if the plaintiff, at all events upon the declaration as it stands, could have entered into evidence of a sub-contract. As the case is presented to us we have the plaintiff showing an actual payment of 97l. 10s. extra. In my opinion the defendants should have met this evidence by other evidence, clearly showing that the coal was bought not for consumption but re-sale, and that at Havre there had been a rise in the market corresponding to the rise at the pit's mouth. No evidence of the kind was offered; and I do not think we can, in its absence, draw the inference which has been suggested by Mr. Herschell. The plaintiff made out a *primâ facie* case of damage, to which the defendants attempted no answer.

MARTIN, B. I am of the same opinion. There was, in my judgment, evidence that the plaintiff had been damaged beyond the increased freight to the extent of 97l. 10s. The payment of that sum is some evidence that the plaintiff lost it; and the defendants should have offered evidence in contradiction, if they denied that that sum was really lost to the plaintiff. It is impossible to say that the amount is "not in point of law recoverable."

POLLOCK, B. I am of the same opinion. The plaintiff showed that he was out of pocket to the extent of 97l. 10s. owing to the defendant's default. This is *primâ facie* evidence of damage, and any circumstance mitigating the loss, such as a rise in the market price of coal at Havre, ought to have been proved by the defendants, and not left to us to infer from a rise at the pit's mouth.

Rule discharged.

Attorney for plaintiff: S. R. Hoyle.

Attorneys for defendants: Shum & Crossman.

[Law Reports, 8 Exchequer, 126.]

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*ENGLAND V. COWLEY.

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Conversion — Evidence — Preventing Removal of Goods.

The plaintiff was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession, and afterwards went to M.'s house to remove them. Upon his arrival at the house he was met by the defendant, M.'s landlord, who told him that rent was in arrear, and that until it was paid the goods should not be removed; and measures were taken by the defendant to use force, if necessary, to prevent their removal. It was then after sunset, and therefore too late in the day to distrain, and the defendant intended to prevent the plaintiff from removing the goods with a view of distraining on the day following. The plaintiff continued in possession of the goods, but made no attempt actually to remove them; and, except by intimating his intention to prevent their being removed, the defendant did not take possession of, or assume dominion over, them. In an action of trover:

Held (by Kelly, C.B., Bramwell and Pollock, BB., Martin, B., dissenting), that there was no evidence of conversion:

(By Bramwell, B.) That an actual prevention by force of the removal of the goods would not have amounted to a conversion.

TROVER for household furniture.

Plea: not guilty by statute (11 Geo. 2, c. 19, s. 21).

Issue.

The plaintiff was the holder of a bill of sale over the household furniture of Miss Morley, the tenant to the defendant of a house in River Terrace, Chelsea. The bill of sale contained the usual clauses enabling the plaintiff to take possession of, and remove and sell the furniture in case of default upon Miss Morley's part in payment of the sum advanced. She having made default, the plaintiff put a man in possession early in August, 1872, and upon the 11th of August sent two of his men with vans to remove the furniture from the house. It was then after sunset. The men were met at the house by the defendant, the landlord, who alleged that half a year's rent was due and in arrear, and stated that he did not intend to allow the goods to be removed, as he meant to distrain on the day following. One of the men returned, and informed the plaintiff of what had passed. The plaintiff thereupon went to the house himself, and was told by the defendant, who was in the passage, that he would not suffer any of the goods to be taken away until his rent was paid. The defendant had also engaged a policeman, whom he stationed outside, to prevent the removal of the goods. The plaintiff thereupon gave up the attempted removal and went away, leaving a man still in possession. The defendant did not himself actually take possession of or remove

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any of the goods upon this occasion. His object was to prevent the plaintiff's removing them in order to distrain the next day at a legal hour.

The cause was tried before Bramwell, B., at the Surrey summer assizes, 1872. In summing up the learned judge directed the jury in the following terms: "If you are of opinion that the defendant did not deprive the plaintiff of his goods, did not take possession of, nor assume dominion over, them, but merely prevented the plaintiff from removing them from one place to another, allowing him to remain in possession of them if he liked, then there is no cause of action." The jury answered this question in favor of the defendant, and a verdict was entered for him accordingly, with leave to enter a verdict for the plaintiff for 40*l.*, the value of the goods, if the court should be of opinion that the learned judge ought to have directed a verdict for the plaintiff. A rule was obtained in Michaelmas Term accordingly, on the ground that the learned judge ought to have directed the jury that the conversion was proved.

Holl showed cause. There was no evidence of a conversion. Throughout, the plaintiff had possession of his goods. All that the defendant did was to assert his right to prevent their removal, and if the plaintiff chose to yield and not remove them, that is not evidence of conversion. The same would be true if he had actually prevented their being taken out of the house. But he did not go so far. He only threatened to prevent the plaintiff from taking them away: *Fowler v. Hollins* ⁽¹⁾; *Burroughes v. Bayne*. ⁽²⁾

[MARTIN, B. In *Foulkes v. Willoughby* ⁽³⁾ Alderson, B., says, at p. 548, that any act "inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places," amounts to a conversion. Has not the defendant here done what is inconsistent with the plaintiff's general right?]

128] *No. He never was in possession of the goods. The act done must be either asportation or detention. The finding of the jury, moreover, really concludes the case.

Joyce, in support of the rule. It is impossible to say there was no evidence of conversion. There was a complete and effectual interference with the plaintiff's rights as owner. The jury have found, not merely that the defendant threatened to prevent, but that he did prevent, the removal of the goods. This was "an exercise of dominion over them inconsistent with the true owner's title:" see *Wilbraham v. Snow*. ⁽⁴⁾ It was an un-

(1) Law Rep., 7 Q. B., 616.

(2) 5 H. & N., 296; 29 L. J. (Ex.), 188.

(3) 8 M. & W., 540.

(4) 2 Notes to Saund. by Wms., pp. 87, at p. 108, n. (a).

qualified assertion of right which the plaintiff could only have questioned by force, and by which he was "wrongfully deprived of the use and possession of his goods" (see Common Law Procedure Act, 1852, sch. B., form 28).

[BRAMWELL, B. The form for a declaration in trover given in the Common Law Procedure Act, 1852, sch. B., which alleges that the defendant "converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," does not enlarge the scope of the action. The alternative words were inserted at the suggestion of Lord Denman, with a view merely of explaining the nature of "conversion."]

The defendant's act amounted to a detention of the goods from the plaintiff.

POLLOCK, B. I am of opinion that this rule should be discharged. The defendant was never in possession of the goods. No doubt cases might be put where a wrong doer, though not in actual possession, uses such force or contrivance as to interfere entirely with the dominion of the true owner; but here there was a mere assertion of right on the defendant's part. I think the plaintiff should have insisted upon removing the goods, if he intended afterwards to challenge the defendant's assertion in an action of trover. It is a sound rule of law which is laid down in Co. Litt. 253, b. where continual claim is treated of, that it is not every cause of fear which can excuse a person from not claiming his rights. The fear must not be a "vain feare." It must be "some just cause of feare." Now in this case the plaintiff proved no act of interference, *but only a threat, [129 which the plaintiff, if he meant afterwards to stand by his rights, ought to have resisted. Mr. Joyce has urged that the defendant detained the plaintiff's goods; but in fact he never had them to detain. He merely said, "You shall not remove them." That is not enough to furnish ground for this action.

BRAMWELL, B. I am of the same opinion. I think no action is maintainable, because the defendant did no act, but only threatened that, in a certain event, he would do something. The plaintiff should either have proceeded with the removal of the goods, or at least have commenced to remove them, leaving the defendant to stop him at his peril, when there might have been a cause of action of some sort. But further, even if the defendant had prevented the removal of the goods by physical force, I do not think trover would have been maintainable. The substance of that action is the same as before the Common Law Procedure Act, 1852, and although in the form of declaration there given in sch. B. the words used are, "converted to

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his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," the gist of the action is the conversion, as for example, by consuming the goods or by refusing the true owner possession, the wrong-doer having himself at the time a physical control over the goods. Now here the defendant did not "convert" the goods to his own use, either by sale or in any other way. Nor did he deprive the plaintiff of them. All he did was to prevent, or threaten to prevent, the plaintiff from using them in a particular way. "You shall not remove them," he said, but the plaintiff still might do as he pleased with them in the house. Assume that there was actual prevention; still I think this action cannot be maintained. Take some analogous cases, by way of illustration. A man is going to fight a duel, and goes to a drawer to get one of his pistols. I say to him, "You shall not take that pistol of yours out of the drawer," and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not. Or, again, I meet a man on horseback going in a particular direction, and say to him, "You shall not go that way, you must turn back;" and make him comply. Who could say that I had been guilty of a conversion of the horse? Or I might prevent a man from pawning his watch, but no one would call that a conversion of the watch by me. And really this case is the same with these. Illustrations of my meaning might be easily multiplied. The truth is that, in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that *something* shall not be done by the plaintiff; he must say that *nothing* shall. Now here there was no interference with the plaintiff's rights except the statement by the defendant that he would prevent the goods from being removed. This is not sufficient to furnish a basis for the present action. For it must be remembered that if the defendant is liable at all, it is for the value of the goods. But how unjust that would be! The plaintiff's man was left in possession. Miss Morley could not legally take away the goods. If she did, the plaintiff could maintain an action against her for their wrongful removal. Yet he is also to be able to recover their full value against the defendant. Moreover, I cannot but think that the jury really negatived all idea of conversion. "If you are of opinion," they were told, "that the defendant did not deprive the plaintiff of his goods, did not take possession of, nor assume dominion over them, but merely prevented the plaintiff from removing them from one place to another, allow-

ing the plaintiff to remain in possession of them if he liked," then there is no cause of action. The jury answered this question in favor of the defendant. There had, therefore, been no general assertion of right to the exclusion of the plaintiff.

MARTIN, B. I think this rule should be made absolute. The real question is whether the defendant "converted to his own use, or wrongfully deprived" the plaintiff of his goods. Now it appears that the plaintiff had a bill of sale over the goods of one Morley, whose landlord the defendant was. After sunset on the 11th of August, 1872, when a distress was impossible, the plaintiff, who had previously put a man in possession, went himself to the house, with the view of removing the goods, there having been a default under the bill of sale. The defendant could not distrain that evening, but in order to have the opportunity of distraining he *told the plaintiff that he would [131] prevent the goods being removed, and he took steps accordingly, placing a policeman to watch the house and prevent the removal. I think this was a conversion. The plaintiff was not bound to resist the defendant, and to remove his goods at the peril of coming into collision with him. He was deprived, by the plaintiff's act, of the power over his goods which he was entitled to exercise. That is, in my opinion, enough to enable him to maintain this action. If the defendant had been in the room where the goods were, and had said to the plaintiff, "These goods shall not be removed," surely that would have been a "wrongful deprivation." The defendant was, in fact, not in the room but in the passage, with equal means, however, of stopping the removal. I can see no difference between the two cases.

KELLY, C.B. I am of opinion that this rule should be discharged. The defendant, in my judgment, never converted these goods to his own use. The plaintiff was himself in actual possession of them, and all the defendant did was to say, "Rent is due to me, and before that rent is paid I will not allow these goods to be removed." This is no conversion. Many illustrations might be put to show how absurd would be the consequences of so holding. For instance; suppose a lodger was ill, and an attempt were made to remove the bed he was lying on. Some one interferes, and says to the man who wants to remove, and who is the true owner, "You shall not do so." This is an interference with his dominion over his own property; yet there would be no conversion. Indeed, it is only by relying upon the somewhat vague language which has been used about this form of action that any plausible argument can be maintained. Apart from mere *dicta*, no case, so far as I am aware, can be

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found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right, although, if in possession of the property, any dealing with it, inconsistent with the true owner's right, would be a conversion. A limited interference with the plaintiff's property, where all along the plaintiff is himself in possession, does not constitute conversion. In the case of *Fowler v. 132*] *Hollins* ⁽¹⁾ *the cotton was in the defendant's actual possession. I thought him not guilty because he was acting as broker merely; but even assuming the case was well decided, the plaintiff was out of possession, and the defendant had full control over the goods. So also in *Wilbraham v. Snow* ⁽²⁾, the plaintiff's tools were entirely under the control of the defendant. Nor does the case referred to by my Brother Martin, of *Fouldes v. Willoughby* ⁽³⁾ really assist the plaintiff; for the *dictum* of Alderson, B., which at first sight appears to favor his contention, is founded upon the assumption that the plaintiff was out of actual possession of the goods.

I think, therefore, that the plaintiff must fail in this form of action. He may have another remedy by some form of action of trespass on the case, but the measure of damages would be different. It would be unjust that, under the circumstances proved, he should recover against the defendant the value of the goods. The rule must, therefore, be discharged.

Rule discharged.

Attorney for plaintiff: *C. H. Lind.*

Attorney for defendant: *W. Day.*

⁽¹⁾ Law Rep., 7 Q. B., 616.

⁽²⁾ 2 Notes to Saund. by Wms., 87.

⁽³⁾ 8 M. & W., 540.

[Law Reports, 8 Exchequer, 132.]

Jan 27, 1873.

MATTHEWS V. BAXTER.

Contract Void and Voidable—Drunkenness—Ratification.

The contract of a man, too drunk to know what he is about, is voidable only, and not void, and therefore capable of ratification by him when he becomes sober.

DECLARATION for breach of contract in not completing the purchase of houses and land bought of the plaintiff at a sale by auction.

Plea, that at the time of making the alleged contract, the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff well knew.

Replication, that after the defendant became sober, and able to transact business, he ratified and confirmed the contract.

Demurrer and joinder.

Manisty, Q.C. (*Hills*, with him), in support of the de- [133 murrer. The contract of a man, who was totally drunk and incapable at the time, is not voidable merely, but void: *Gore v. Gibson*.⁽¹⁾ It cannot therefore be ratified. *Molton v. Camroux*⁽²⁾, which may be relied on by the plaintiff, only proves that where a lunatic's or drunkard's contract is executed, and the parties to it cannot be replaced in *statu quo*, such a contract cannot afterwards be set aside. In the present case the contract is executory, and the parties to it can be replaced in their original position.

Morgan Lloyd, contra. The case of *Molton v. Camroux*⁽²⁾, shows that a drunken man's contract is only voidable. *Gore v. Gibson*⁽¹⁾ is no authority to the contrary, for although in that case such a contract is spoken of as "void altogether," that expression must be taken with regard to the facts then under consideration. There was no suggestion there of any ratification, and the defendant was entitled to succeed upon proof that his contract was voidable, and that he afterwards avoided it. Suppose the defendant wished to enforce the contract. The plaintiff could not refuse to perform it. But if the defendant could have enforced performance he certainly had power to confirm it.

KELLY, C.B. I am of opinion that our judgment must be for the plaintiff. It has been argued that a contract made by a person who was in the position of the defendant, is absolutely void. But it is difficult to understand this contention. For, surely, the defendant, upon coming to his senses, might have said to the plaintiff, "true, I was drunk when I made this contract, but still I mean, now that I am sober, to hold you to it." And if the defendant could say this, there must be a reciprocal right in the other party. The contract cannot be voidable only as regards one party, but void as regards the other; and if the drunken man, upon coming to his senses, ratifies the contract, I think he is bound by it.

MARTIN, B. I am of the same opinion. The judges in *Gore v. Gibson*⁽¹⁾ use the word "void," it is true, but I cannot think they meant absolutely void. They simply meant to say that a drunken man's contract could not be enforced against [134 his will. But it by no means follows that it is incapable of ratification. The case is an authority that this plea is good, but no authority for holding the replication bad. I think that

(¹) 13 M. & W., 623.

(²) 2 Ex., 487; 4 Ex., 17; 18 L. J. (Ex.), 68, 356.

a drunken man when he recovers his senses, might insist on the fulfilment of his bargain, and therefore that he can ratify it, so as to bind himself to a performance of it.

PICOTT, B. I agree with the rest of the court, although with some hesitation. The language of the judges in *Gore v. Gibson* ⁽¹⁾ must be taken with regard to the subject then under consideration; and the word "void" must be taken to mean no more than that the contract could not be enforced in *invitum* against the defendant. Upon the whole, I think the contract was voidable only, and therefore capable of ratification.

POLLOCK, B. I am of the same opinion. The case of *Gore v. Gibson* ⁽¹⁾ was, no doubt rightly decided, but some of the *dicta* of the judges cannot be supported in all their fulness since the decision in *Molton v. Camroux*. ⁽²⁾ I think the contract of a drunken man is voidable and not void.

Judgment for the plaintiff.

Attorneys for plaintiff: *Hekler & Roberts.*

Attorneys for defendant: *Wood & Tinkler.*

⁽¹⁾ 13 M. & W., 623.

⁽²⁾ 2 Ex., 487; 4 Ex., 17; 18 L. J. (Ex.), 68, 356.

The mere fact that one is intoxicated when he enters into a contract, will not entitle him to avoid it unless the intoxication be so complete as to deprive him of reason or the mental infirmity amount to *senile dementia*, unless there be circumstances of fraud or undue influence. *Burns v. O'Rourke*, 5 Rob., 649; *Smith's Man. of Equity*, 67; *Smith v. Downing*, West's Chy. Rep., 90, and cases cited in note; *Cory v. Cory*, 1 Ves., 19; *Cook v. Claysworth*, 18 Ves., 15; *Johnson v. Medcott*, 3 Peere Williams's Rep., 130; *Smith on Cont.*, 348, 5th Am. ed. and note (307 marg. p.); *Moak's Van Santvoord's Pl.*, 360; *Peck v. Cary*, 27 N. Y., 9; 1 Redfield on Wills, 92; *Nagle v. Baylor*, 3 Drury and Warren, 60, 64; *Gore v. Gibson*, 13 Mees and Welsb., 623; 1 Parsons on Cont., 384, 6th ed.

A lease obtained by fraud and circumvention from a person in a state of intoxication, is void in equity. *Buller v. Mulvehill*, 1 Bligh, 137 and see note, pages 159-162.

In a suit upon a mortgage it is a good defence, that the defendant was so intoxicated at the time of signing the same, as to be incapable of executing it. A reply that he retained and used the goods for which the mortgage was given

is invalid. The action is not on a claim for goods sold, but on the written promise and the reply shows no ratification of that act. In such case an instruction to the jury, "that if the defendant, at the time of the execution of the mortgage, as a result of drunkenness, or any other diseased condition of the mind, was deprived of his understanding, so that he had not sufficient capacity to act with discretion in the ordinary affairs of life, the plaintiff cannot recover," is correct. *Reinskopf v. Rogge*, 37 Ind., 207.

If one who executes a contract which he might avoid on account of intoxication, after becoming sober do any act recognizing the validity of such contract he cannot afterward avoid it. *Nagle v. Baylor*, 3 Drury and Warren, 60.

Although a note executed by one who is totally drunk is void in the hands of one knowing the facts, it is valid in the hands of an innocent holder for value. The rule is not the same as in cases of insanity. Drunkenness is a temporary disability voluntarily produced; insanity is permanent and providential. *State Bank v. McCoy*, 69 Penn. St. Rep., 204; *Sentance v. Pool*, 3 Carr. and Payne, 1 (14 Eng. C. L. Rep.).

C A S E S

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IN

MICHAELMAS TERM, XXXVI VICTORIA.

[Law Reports, 2 Crown Cases Reserved.]

Nov. 23, 1872.

THE QUEEN v. GUMBLE.

[1

Larceny—Indictment—Amendment—Money—14 & 15 Vict. c. 100, ss. 1, 18.

The prisoner was indicted for stealing nineteen shillings and sixpence. He was proved to have stolen a sovereign:

Held, that by 14 & 15 Vict. c. 100, s. 1, the court at the trial had power to amend the indictment, if necessary, by substituting the word "money" for the words "nineteen and sixpence;" and that, by s. 18, the indictment so amended was proved.

Case stated by the chairman of the Surrey Quarter Sessions:

At the general quarter session of the peace holden by continuance at St. Mary, Newington, in and for the county of Surrey, on the 3d of July, 1872, James Gumble was indicted for stealing, on the 29th of May, 1872, nineteen shillings and sixpence from William Jackson Walton.

The prosecutor had been playing at throwing sticks at cocoa nuts on Epsom Downs, and had to pay the prisoner sixpence; but having nothing less than a sovereign, he said to the prisoner, "Have you change for a sovereign?" The prisoner said "Yes;" and in consequence of that prosecutor gave him a sovereign. He then pulled some money out of his pocket, and said "I haven't enough, I'll go and get it for you; I won't be a minute, just wait here." The prosecutor waited nearly an hour for the prisoner, and then went for a policeman, leaving a friend who had been with him all the time to wait for the prisoner. This he did for quite another hour after the prosecutor went for the policeman. The prisoner's son removed the sticks and cocoa nuts at the expiration of the first hour. The prisoner did not return, and was not apprehended until the following Saturday, the 1st of June, on which occasion, when he

*S.C., 12 Cox Cr. Cas., 248.

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saw the prosecutor's friend, he immediately ran away, and was only captured after a chase of some distance. On his apprehension 4*l.* 10*s.* was found upon him.

It was objected by the prisoner's counsel that there was no case against the prisoner; for if he were guilty of any offence, he was guilty of stealing a sovereign; and that the court had no power to amend the indictment.

The court allowed the case to go on, and put it to the jury, that if they believed the prisoner, at the moment of obtaining the sovereign, intended by a trick feloniously to deprive the prosecutor of the possession of the sovereign, they were to find him guilty. They found him guilty, and the questions were reserved for the decision of the court for Crown Cases Reserved, as to whether the prisoner, being found guilty of stealing a sovereign could rightly be convicted under an indictment charging him with stealing nineteen shillings and sixpence; and also, whether the court would have had the power to amend the indictment at an earlier stage of the case?

No counsel appeared for the prisoner.

John Thompson, for the prosecution. If there be any variance between the indictment and the proof, the indictment might, by 14 & 15 Vict. c. 100, s. 1 (¹), be amended by inserting the word 3] "money" as the description of the thing stolen. That would make the indictment good within s. 18. And, upon the case as stated, this amendment must be taken to have been made at the trial before verdict.

KELLY, C.B. We are all of opinion that there was power to amend if any amendment be necessary; and that, on the case as stated, we must take that to have been done, if it be necessary.

MARTIN, B. I think there was power to amend. And that may be done by altering the description to "money" simply, which makes the conviction good.

(¹) By 14 & 15 Vict. c. 100, s. 1; "Whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof . . . in the name or description of any matter or thing whatsoever therein named or described, . . . it shall and may be lawful for the court before which the trial shall be had . . . to order such indictment to be amended. . . ."

By s. 18, "in every indictment in which it shall be necessary to make any

averment as to any money, or any note of the bank of England, or of any other bank, it shall be sufficient to describe such money or bank note simply as money without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved. . ."

BRETT, J. The defect, if there be one, is one of description, and may be amended by describing the things stolen as "money." And, on the case, we must take this amendment as made before verdict.

GROVE and QUAIN, JJ., concurred. *Conviction affirmed.*

Attorneys for prosecution : *Rogers & Sons.*

[Law Reports, 2 Crown Cases Reserved, 3.]

Nov. 23, 1872.

THE QUEEN v. WIDDOP.*

Bankruptcy — Examination of Bankrupt — Irregularity — Waiver — 32 & 33 Vict. c. 7., ss 18, 96, 97, 108, 125.

A debtor petitioned for liquidation by arrangement on the 8th of June. The first meeting of creditors was held, and a resolution appointing a trustee passed on the 28th of June. The registrar's certificate of the appointment was dated the 5th of July. By a summons, issued on the 29th of June, the debtor was summoned to appear on the 9th of July, and be examined under ss. 97 & 98 of the Bankruptcy Act, 1869. He appeared on the 9th of July, and took no objection to the summons. The examination was adjourned to the 12th of July, on which day he again appeared without objection, and was examined. The examination having been admitted in evidence against him on a subsequent indictment for an offence under s. 11 of the Debtor's Act, 1869:

Held, that supposing the summons to have been improperly issued before the registrar's certificate of the appointment of the trustee had been given, the defect was only an irregularity, which the debtor had waived by appearing and submitting to be examined without objection; and that the examination was properly admitted in evidence.

The prisoner was indicted at the last assizes held at Leeds, *under the 14 & 15 subsections of the 11th section of the [4 Debtors Act, 1869; for that he being a trader, within four months before the commencement of his liquidation, obtained property on credit under the false pretence of dealing in the ordinary way of his trade, and had not paid for the same, and that he, being a trader within the like period of four months, disposed of otherwise than in the ordinary way of his trade, property obtained on credit and not paid for.

At the trial an examination of the prisoner, taken before the registrar of the Bankruptcy Court, was tendered in evidence for the prosecution, and objected to.

The following are the dates of the proceedings in liquidation :

The petition was presented on the 8th of June, 1872. The first meeting of creditors was held, and appointment of trustee made on the 28th of June, 1872. The registrar's certificate of the appointment of the trustee was dated the 5th of July, 1872.

*S. C. 12 Cox's Crim. Cas., 251.

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The prisoner was summoned to be examined under the 96th section of the Bankruptcy Act, 1869. The summons was issued on the 29th of June, and the prisoner attended in pursuance of it, and was examined on the 9th of July, and again by adjournment on the 12th of July.

The examination then taken was the one tendered in evidence.

The first objection was, that the summons being issued before the certificate of appointment of trustee, was not in compliance with the 96th section, and the examination taken under it obtained by an unlawful exercise of authority, and therefore inadmissible. The summons was in the form 76 of the bankruptcy forms.

Another objection taken, was that the examination was taken by the registrar, and not by the judge, as directed by the 97th section, and that there was no proof that the judge had, under the 67th section, delegated to the registrar the power of taking the examination.

To this it was answered that the summons was issued by the court, and that the place, viz., the Court House, and time of examination were named in it, and that as the examination took place at the time and place named before the registrar, as a part of the proceedings in liquidation, it must be presumed that he was acting lawfully in taking the examination.

5] *Another objection was taken, that so far as regards certain questions and answers in the examination, the questions had a direct tendency to criminate the prisoner by proving the very charges upon which the indictment was framed.

Upon this objection the cases, *Reg v. Scott* ⁽¹⁾; *Reg v. Skeen* ⁽²⁾; *Reg v. Robinson* ⁽³⁾, were referred to on behalf of the prosecution.

A fourth objection was, that whatever the law may have been under former acts of parliament, yet, under the present act, as, by s. 108, the deposition is made evidence upon the death of the bankrupt, it ought not to be admitted during his lifetime.

It was proved that each sheet of the examination was signed by the prisoner.

The learned judge admitted the whole of the examination. The prisoner was convicted.

If the whole examination was admissible, the conviction was to stand. If the whole or any part was not admissible, the conviction was to be quashed.

Nov. 16. *Waddy* (*Wilberforce* with him), for the prisoner. The examination was not admissible as having been taken under the Bankruptcy Act, for the provisions of the act were not complied with, and therefore the case differs from *Reg. v. Scott* ⁽¹⁾

⁽¹⁾ Dears. & B., Cr. C., 47; 25 L. J. (M.C.) 128.

⁽²⁾ Bell Cr. C. 97; 28 L. J. (M.C.) 97.

⁽³⁾ Law Rep., 1 C. C., 80.

and *Reg v. Robinson* ⁽¹⁾. The due issue of a summons is a condition precedent of the right to examine the debtor under ss. 96 and 97 of the Bankruptcy Act ⁽²⁾. By s. 96 the summons can, in case of bankruptcy, *only be issued on the application of the trustee and after adjudication. And by s. 18 the appointment of a trustee dates from the certificate, not the vote. In the case of liquidation, by s. 125, the certificate has the same effect as in bankruptcy, and therefore the appointment dates from the certificate, and the appointment of the trustee is the equivalent of adjudication. In this case, therefore, when the summons issued there was no trustee to apply, and nothing equivalent to adjudication had occurred. Nor was the examination admissible at common law. It was compulsory, and it tended to criminate: *Reg v. Garner* ⁽³⁾; *Reg v. Baldry* ⁽⁴⁾; *Reg v. Jarvis* ⁽⁵⁾.

[BYLES, J., referred to *Reg v. Reeve* ⁽⁶⁾.]

⁽¹⁾ Law Rep. 1 C. C. 80.

⁽²⁾ By 32 & 33 Vict. c. 71, s. 18, "the appointment of a trustee shall be reported to the court; and the court, upon being satisfied that the requisite security has been entered into by him, shall give a certificate declaring him to be trustee of the bankruptcy named in the certificate, and such certificate shall be conclusive evidence of the appointment of the trustee, and such appointment shall date from the date of such certificate."

By s. 96, "the court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt"

By s. 97, "the court may examine upon oath, either by word of mouth or by written interrogatories, any person so brought before it in manner aforesaid concerning the bankrupt, his dealings or property."

By s. 108, "in case of the death of the bankrupt or his wife, or of a witness whose examination has been received by any court under this act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to."

By s. 125, "the following regulations shall be made with respect to the liquidation by arrangement of the affairs of a debtor"

"(1) A debtor unable to pay his debts may summon a general meeting of his

creditors, and such meeting may by a special resolution declare that the affairs of the debtor are to be liquidated by arrangement and may at that or some subsequent meeting, held at an interval of not more than a week, appoint a trustee"

"(4) The special resolution, together with the name of the trustee appointed shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section; but if satisfied that it was so passed, and that a trustee has been appointed he shall forthwith register the resolution"

"(6) The certificate of the registrar in respect of the appointment of any trustee in the case of a liquidation by arrangement shall be of the same effect as a certificate of the court to the like effect in the case of a bankruptcy."

"(7) The provisions of this act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement And in construing such provisions the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy."

⁽³⁾ 1 Den. Cr., C., 329; 18 L. J. (M. C.), 1.

⁽⁴⁾ 2 Den. C. C., 430; 21 L. J. (M. C.), 130.

⁽⁵⁾ Law Rep., 1 C. C., 96.

⁽⁶⁾ Law Rep., 1 C. C., 362.

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J. W. Mellor (*Tennant* with him), for the prosecution. The summons was regularly issued, for the trustee had been appointed at the time, though the appointment was not registered till afterwards. Whatever may be the case in bankruptcy, s. 125 *shows that in liquidation the appointment is something [7 that precedes the registration : *Ex parte Duignan* (*).]

[*Waddy* referred to *Ex parte Isaac* (*).]

But, even if it be otherwise, it was a mere irregularity, which the prisoner waived by appearing and submitting to be examined without objection : *Reg. v. Fletcher* (*); *Turner v. Postmaster General* (*); *Reg. v. Shaw* (*). There is a dilemma. If there was jurisdiction the examination was good under the act. If not, it was a voluntary statement : *Reg. v. Stoggett* (*).

Waddy replied.

Cur. adv. vult.

Nov. 23. KELLY, C.B. We are all of opinion that the conviction in this case must be affirmed. Two points have been pressed upon us in argument on the part of the prisoner ; first, that the summons under which he attended the court and was examined was irregular, as having been issued before the registration of the resolution of creditors by which the trustee was appointed, and was issued, therefore, by a trustee whose appointment had not at the time been registered. Upon this question it is unnecessary to express any opinion, for we are all of opinion that the irregularity, if there was any, was waived by the appearance of a prisoner. The objection is a technical one. The section upon which it is founded prescribes merely the mode by which the person to be examined is to be brought before the court. And I think it would be equally contrary to legal principles and common sense, if we were to hold that the prisoner, after voluntarily attending and submitting to examination without objection was at liberty to raise an objection to the validity of the summons afterwards.

MARTIN, B. I am of the same opinion. The facts of the case are these : The prisoner presented his petition for liquidation on the 8th of June. The first meeting of creditors was held, and a trustee was appointed by the votes of the creditors [8] on the *28th of June. On the following day the trustee applied for and obtained a summons, under s. 96 of the Bankruptcy Act 1869, for the examination of the insolvent. The summons required the prisoner's attendance on the 9th of July ; and he had the whole interval down to that day to consider his

(*) Law Rep., 6 Ch., 605.

(*) Law Rep., 6 Ch., 58.

(*) Law Rep., 1 C.C., 320.

(*) 5 B. & S., 756 ; 34 L. J. (M. C.). 10. 98.

(*) Leigh & Cave Cr. C., 579 ; 34 L. J.

(M.C.). 169.

(*) 1 Dears. Cr. C., 656 ; 25 L. J. (M.C.),

course. On the 9th of July he appeared without protest or objection. The examination was adjourned to the 12th, when he again appeared without objection and was examined. The examination was read over to him, and he signed his name to each sheet of it. Yet it is said that this examination is not admissible against him upon the present indictment. The ground of that contention is that it is said he was compelled to criminate himself. It is, no doubt, true that no man is, by the general rule of our law, bound to criminate himself. But the questions put to the insolvent were not for the purpose of criminating him; they were put for another purpose. The case of *Reg v. Scott* ⁽¹⁾ expressly decided that an examination of a bankrupt, taken under circumstances similar to the present, if lawfully taken, is admissible afterwards in evidence against him. And I think that case is conclusive of the present. The examination in this case appears to me to have been lawful both at common law and under the statute. The Court of Chancery has always exercised the power of compulsory examination, and the common law courts now do the same by interrogatories. It has been the opinion of many judges (and I do not know that the opinion has ever been overruled) that an interrogatory may be put, although it tend to criminate, leaving the person interrogated to object to answering it. But here the examination was not in fact compulsory. The insolvent appeared and was examined, without making any objection, and, therefore, without being compelled. But the examination was also lawful under the statute. The objection taken under the statute is, that the summons was issued before the registration of the appointment of the trustee. But I think that objection fails; for, even if there was any irregularity, the prisoner, by appearing without objection, waived the irregularity, and submitted to the jurisdiction of the court. For my own part, I am further of opinion that there was no irregularity.

*BRET, J. I am of the same opinion. It has been contended that the answers of the prisoner were inadmissible because they were given under compulsion, and that compulsion was illegal. The alleged illegality consisted in this, that the summons was irregular, having been issued before the registration of the trustee's appointment. I think it is unnecessary here to decide from what point of time the trustee's appointment is to be taken as dating; or whether the summons was regular. The examination took place at a time when the trustee's title had been completed by registration, and when the court had jurisdiction to examine the prisoner. It is a mistake

(1) 1 Dears. & B. Cr., C., 47; 25 L.J., (M.C.), 128.

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to speak of it as a condition precedent to the jurisdiction that the debtor should have been regularly summoned. The defect was at most an irregularity, which was waived by the prisoner's appearing and submitting to be examined. It was admitted during the argument that the prisoner might have been tried for perjury committed on such an examination; and that is in principle an admission of jurisdiction. The present case seems to me to be governed by *Reg. v. Scott* ⁽¹⁾, and *Reg. v. Robinson* ⁽²⁾.

BYLES and MELLOR, JJ., concurred. *Conviction affirmed.*

Attorney for prisoner: *M. K. Braund, for J. Green, Bradford.*

Attorneys for prosecution: *Clarke & Son, for Terry & Co., Bradford.*

(1) 1 Dears. & B. Cr. C., 47; 25 L. J. (M.C.), 128. (2) Law Rep., 1 C. C., 80.

[Law Rep., 2 Crown Cases Reserved, 10.]

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THE QUEEN v. LOCK.

Nov. 23, 1872.

Assault—Consent—Submission.

The prisoner was indicted for indecently assaulting two boys, each of whom was eight years of age. It was proved that the prisoner took the boys into a field, and did acts toward them which amounted to indecent assaults unless they consented to them. The boys stated in evidence that they did not know what he was going to do to them when he did each of the acts in question. Upon this evidence, the judge left to the jury the question whether the boys merely submitted to the acts ignorant of what was going to be done to them or of the nature of what was being done, or if they exercised a positive will about it and consented to what the defendant did; and told the jury that in the former case they would find the defendant guilty, in the latter case they would acquit him. The jury found the prisoner guilty on the ground that the boys merely submitted to his act not knowing its nature:

Held, that the direction of the judge was right, and the conviction must be upheld.

CASE stated by the deputy assistant judge of the Middlesex Quarter Sessions:

At the general session of the peace for the county of Middlesex on the 4th day of June, 1872, James Lock was tried upon an indictment which charged him with indecently assaulting Frederick William Sandell and George Goodge.

It was proved by three witnesses that they saw the defendant in a field by the Edgware road take each of the boys in succession upon his legs, play with their private parts, unbutton his trowsers and theirs, lie upon them, and move himself as if in the act of having connection with a woman.

* S. C., 12 Cox's Criminal Cases.

The two boys, each of whom was only eight years old, proved that the defendant met them in the Edgware road, said he would take them to some fireworks, gave them biscuits and some beer, took them into the field, went up to a wall, to which they followed him, there sat upon the grass, placed them successively upon his lap, laid his hands on their private parts, unbuttoned their trowsers and his own, threw them down on their backs and lay upon them, moving himself in an indecent manner, which one of the boys described by a gesture; the defendant was interrupted by the coming up of the three witnesses, when he told the boys not to tell. The boys were not asked by the counsel on either *side if it was done against their [11 will, or with their consent, but they stated that they did not know what the defendant was going to do to them when he took them into the field and placed them on his lap, and laid them on the ground.

On these facts, it was contended by the counsel for the defendant, that there was no case for the jury, inasmuch as the filthy acts were not done against the will of the boys.

Having determined that it was a question for the jury, in summing up the learned judge stated to them that the law recognized a distinction between mere submission and positive consent. A person may submit to an act done to him from ignorance, or his consent may be obtained by fraud, and in either case would it be such a consent as the law contemplates. Consent means an active will in the mind of the patient to permit the doing of the act complained of, and knowledge of what is to be done, or of the nature of the act that is being done, is essential to a consent to the act. It had been contended that inasmuch as an assault must be an act done against the will of the patient, and the boys did not expressly dissent, there was no assault. But this assumes a consenting will on their parts, and both stated that they did not know what the defendant intended to do, nor the meaning of what he was doing. The facts of the case were undisputed, and the question left to the jury was, whether, in their judgment, the boys merely submitted to the filthy act ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it and consented to what the defendant did. In the former case they would find the defendant "guilty." In the latter case they would acquit him.

The jury found the defendant "guilty," stating that they did so, being of opinion that the boys merely submitted to the act of the defendant, not knowing the nature of such act.

The question being of frequent occurrence, and the law appearing to be unsettled, on the application of counsel for the

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defendant, the learned judge reserved, for the opinion of this court, the question whether the definition of an assault "that it must be an act done against the will of the patient" extends to the case of submission to the act through ignorance of its nature, and when there was no positive exercise of the will in [2] the way of dissent, or if the active *exercise of an actual dissenting will is necessary to be proved in order to constitute an assault. If it should be the opinion of this honorable court that the direction of the jury was wrong, the conviction was to be quashed; if right it was to be confirmed.

No counsel appeared for the prisoner.

Metcalf, for the prosecution. The direction of the learned judge was correct. There is a clear distinction between mere submission and consent: *Reg. v. Williams* ⁽¹⁾; *Reg. v. Day* ⁽²⁾; *Reg. v. Cise* ⁽³⁾; *Rex v. Rosinski*. ⁽⁴⁾ It may be otherwise, no doubt, upon a charge of rape; but the cases cited show the distinction between rape and assault.

[BRETT, J. In cases of criminal assault by a father upon his daughter I have more than once, with the concurrence of Willes, J., told the jury that in the case of a young child and an adult they must consider whether there has been mere submission on the part of the child, known to be merely so by the adult, or whether there has really been consent.]

Rex v. Nichol ⁽⁵⁾; *Reg. v. Bennett* ⁽⁶⁾; *Reg. v. Fletcher* ⁽⁷⁾; *Reg. v. Fletcher* ⁽⁸⁾ were also cited.

KELLY, C. B. Had this been a case of rape, I might probably have had no hesitation in saying that a rape had not been committed. But here the charge is not one of rape; it is a charge of assault. And the question is, whether such an act as that of the prisoner done to a person who does not actively consent, but merely submits to the act under circumstances in which he cannot exercise his will either one way or the other does not, even in the absence of fraud, amount to an assault. I think it does. It is much like an act done to a person while asleep. And though I do not say that connection with a woman in such a case would be rape, it would be an assault. In the present case the act done was indecent and immoral, and it involved actual physical contact; it may, therefore, be an assault. And [3] though there was submission *on the part of the children, I do not think there was any consent; for they were so wholly

⁽¹⁾ 8 C. & P., 286.

⁽²⁾ 9 C. & P., 722.

⁽³⁾ 1 Den. Cr. C., 580.

⁽⁴⁾ 1 Moo. Cr. C., 19.

⁽⁵⁾ R. & R., 130.

⁽⁶⁾ 4 F. & F., 1105.

⁽⁷⁾ Bell Cr. C., 63; 28 L. J. (M.C.),

85.

⁽⁸⁾ Law Rep., 1 C. C., 39.

ignorant of the nature of the act done as to be incapable of exercising their will one way or the other.

MARTIN, B. Such an act as that of the prisoner is *primâ facie* an assault. And I see no evidence of consent. The case cited of the female scholar, *Rex v. Nichol* (¹), is very like this.

BRETT, J. I agree that to constitute an assault an act must be against the consent of the person to whom it is done. But the question is, whether the judge gave a proper definition to the jury of what is against consent. The case was of acts done to children of tender years by a man of mature years. Still if they had in fact consented to what was done their ignorance of its immorality would not make it an assault. Now, some parts of what the judge said may be open to criticism; but his real view is explained in the question he left to the jury: "The question left to the jury was, whether in their judgment the boys merely submitted to the filthy act ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it, and consented to what the defendant did." That is, in substance, a direction that if the boys merely submitted to what was done (and if they merely did this, the prisoner must have known that it was so), it was an assault; but if there was consent it was no assault. Now, if a child does merely submit to what is done to it by an adult, and the adult knows this, that is an assault. The direction of the learned judge and the finding of the jury were therefore both right.

GROVE, J. I am of the same opinion. The question we are asked is, "whether the definition of an assault, that it must be an act done against the will of the patient, extends to the case of submission to the act through ignorance of its nature, and when there was no positive exercise of the will in the way of dissent, or if the active exercise of an actual dissenting will is necessary to be proved in order to constitute an assault." I do not think an actual dissenting will is necessary. The question is between the positive and the negative; and I think the mere negation of assent is sufficient.

*QUAIN, J. Mere submission by one who does not know[14 the nature of the act done cannot be consent. In many cases, as where an act is done to a person who is asleep, or who has been drugged, there is no consent, though there is no active dissent. And, on the finding of the jury, I think the case is the same here.

Conviction affirmed.

Attorneys for prosecution: *Allen & Son.*

(¹) R. R., 130.

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See *Reg. v. Wollaston*, 2 Eng. R., 234, 12 Cox., 180; 1 Bishop's Criminal Law (5th ed.), §§ 35, 36. *Pillow v. Bushnell*, 5 Barb., 156; 2 Bish. Crim. Proc., §§ 302-3 2d ed.

Where two parties went into a room to fight and one seriously injured the other with what the jury found from the circumstances, to be a sharp danger-

ous weapon: held, he was properly convicted under a statute providing for punishment of one using such a weapon. *People v. Nelson*, 5 Park., 39; affirmed, 23 N. Y., 293. So if one by taking an unfair advantage of his adversary kill him while engaged in a mutual combat. *Whiteley's Case*, 1 Lewin., C. C., 173.

END OF MICHAELMAS TERM.

CRIMINAL LAW CASES.

(12 Cox's Criminal Cases, 228).

February 28, 1872.

*WARWICKSHIRE SPRING ASSIZES.

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Crown Court. (Before Mr. Justice Keating).

REG V. SARAH REASON*.

Evidence — Admission of prisoner — Inducement.

The words "I must know more about it," said by a police-constable to a prisoner in the course of a conversation between them respecting the subject matter of the charge, immediately before apprehension, are not a sufficient inducement to exclude an admission.

Duties of a police officer as to questioning a prisoner.

THE prisoner, Sarah Reason, was indicted for the murder of her child.

It appeared that the child was found drowned in a canal, and a police-constable, who was about to apprehend the prisoner, put questions to her and obtained statements from her with reference to the circumstances of the case. In the course of the conversation he said to her, "I must know more about it;" after which the following admission was made by her, "I did do away with it in the canal at Warwick."

Leigh for the prosecution.

Buszard for the prisoner.

The prisoner's counsel submitted that the words "I must know more about it" amounted to an improper inducement sufficient to exclude the subsequent admission from being put in evidence. He cited from Taylor on Evidence (4th edition), as follows: "The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being in its nature preliminary, is, as we have seen, addressed to the judge, who will require the prosecutor to show affirmatively to his satisfaction that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession"—p. 754. "In these cases *as the authority possessed by the persons [229 who make or sanction the inducement is calculated both to animate the prisoner's hopes of favor, and, on the other, to in-

*Reported by H. F. Pooley, Esq., Barrister-at-Law.

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spire him with awe, and in some degree to overcome the power of his mind, the law assumes the possibility, if not the probability, of his making an untrue admission, and, consequently, withdraws from the consideration of the jury any declaration of guilt which the prisoner under these circumstances may be induced to make. Moreover, and this is a more sensible reason for the rule, the admission of such evidence would naturally lead the inferior agents of the police, while seeking to obtain a character for activity and zeal, to harass and oppress unfortunate prisoners in the hope of wringing from them a reluctant confession"—p. 755.

KEATING, J. (after consulting with Quain, J.), said: I have thought it right to consult with my Brother Quain, and he is very clear that it would be quite an over refinement to exclude this admission. I agree with him, and indeed did not feel much doubt in my own mind. In my time it used to be held that a mere caution given by a person in authority would exclude an admission, but since then there has been a return to doctrines more in accordance with the common sense view. The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of the threat, or hope of profit from the promise. In the present case the police constable was stating his reason for making further inquiries, and it would be straining the rule to an unnatural extent to exclude the admission, especially as it was a statement made in the course of a narrative.

In the course of his summing up the learned judge further observed: "It is the duty of the police constable to hear what the prisoner has voluntarily to say, but after the prisoner is taken into custody it is not the duty of the police constable to ask questions. So, when the police constable has reason to suppose that the person will be taken into custody, it is his duty to be very careful and cautious in asking questions."

Evidence admitted.

[12 Cox's Criminal Cases, 230.]

July 27, 1872.

OXFORD CIRCUIT, STAFFORD SUMMER ASSIZES.

(Before Mr. Justice Quain).

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REG. v. CHRISTOPHER EDWARDS.

Evidence — Murder — Statements of deceased — Res gestæ.

On the trial of a prisoner for the murder of his wife, a neighbor swore that a week before the alleged crime was committed the deceased visited her house, bringing an axe and carving knife, and gave them to her to take care of.

*Reported by John Rose, Esq., Barrister at Law.

Held, that the evidence of what was said by the deceased to the witness on handing her the instruments was admissible.

PRISONER was indicted for the willful murder of his wife Rosannah, on the 30th of April.

Boughey prosecuted.

Motteram defended the accused.

Evidence was given tending to prove that the prisoner often beat his wife, and had killed her with a poker.

A neighbor, called as a witness, stated that on the 22d of April, a week before the alleged murder, the deceased came into her house with a carving knife and a large axe. Quain, J., ruled that evidence of what was then said by the deceased to the witness was admissible. Whereupon, the witness being allowed to continue, added: "She said, 'Please to put them up, and when I want them I'll fetch them, for my husband always threatens me with these, and when they're out of the way I feel safer.'"

The prisoner was found guilty and executed.

Attorney for the prosecution, *Hand*, Stafford.

It may, we think, be doubted whether this case was well decided.

It is sometimes very difficult to determine what declarations are admissible as a part of the *res gestae*, but we do not think that this case presents any such difficulty. The subject may be considered firstly with reference to declarations by the injured party and secondly with reference to those by the party committing the injury. "Declarations are admitted in evidence as part of the *res gestae*, only upon the presumption that they elucidate the facts with which they are connected, having been made without premeditation or artifice, and without a view to the consequences. *Scaggs v. the State*, 1 Morris's State Cases 384. In *Commonwealth v. Pike* (3 Cush., 181) it was held that the declaration of a person who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time, as to allow her to go from her own room to another room up stairs, is admissible in evidence, after her death, as a part of the *res gestae*. So in *Commonwealth v. Hackett* (3 Allen, 136) on an indictment against Hackett for murder, by stabbing, that a declaration by the deceased made immediately after the infliction of the mortal blow,

"Dan Hackett has stabbed me" is admissible in evidence, as a part of the *res gestae*, although the defendant had run away before the declaration was made.

"When a person has received a mortal wound, his declaration as to the cause of the injury, made immediately after the blow, and in immediate connection with his statement of the manner of his receiving it, may be received in evidence as part of the *res gestae*. *Donnelly v. State*, 26 N. J. Law Rep., (2 Dutch.), 601.

In the *Queen v. Lunny* the deceased had died from the effects of a wound on his head. A girl in the neighborhood had heard a cry, and coming out, had found the deceased standing, with his cap in his hand, and apparently weak and injured. The deceased only survived a few hours. Monahan, chief justice, held (*Mullingar assizes*) that the statement made by the deceased to the girl immediately on her coming up, complaining of the injury, was admissible in evidence, being part of the *res gestae*. *Reg. v. Lunny*, 6 Cox Crim. Cas., 477; In *Rex v. Foster* (6 Carr. & Payne, 325, 5 Eng. C. L.) A was charged with manslaughter in killing B by driving a cabriolet over him. C saw the cabriolet drive by, but did not see the accident and

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immediately afterwards, on hearing B groan, C went up to him when B made a statement to him as to how the accident had happened: Held that this statement was receivable in evidence on the trial of A for the manslaughter of B. In the *State v. Keene*, 50 Missouri, 357, it was held that on an indictment for murder, evidence of threats made by the deceased the day prior to the homicide, and continuing uninterruptedly down to the time of the death, declaring his intention to kill the accused, is competent as a part of the *res gestae* and should not be excluded from the jury. See also *Dolan v. Egan*, 63 Barb., 73.

"In order to render declarations competent evidence in favor of the declarant, on the ground that they are part of the *res gestae*, it is essential that they should have been made contemporaneously with the main fact which they are offered to illustrate, and whilst the transaction they are supposed to explain was being carried on; and hence the declarations of a party accused of murder, made just before the killing, while the deceased was absent, and when the accused did not suspect that a conflict with the deceased was impending, is inadmissible in his favor. *Newcomb v. The State*, 2 Morris's State Cases, 1303.

In *Spatz v. Lyons* (55 Barb., 476), an action to recover for the wrongful death of plaintiff's wife alleged to have been caused by defendant's beating her it was held that although a statement made by the wife to the plaintiff, respecting the assault, immediately after it occurred might be admissible in evidence as part of the *res gestae*, to show who the person was that committed the assault, yet a conversation held with the plaintiff, the next day, by the wife could not be received. See also *Baccio v. People*, 41 N. Y., 265.

On the other hand in *Insurance Co. v. Mosley* (8 Wallace, 397), it was held that a declaration made by a deceased person contemporaneously or nearly so, with a main event by whose consequence it is alleged he died, as to the cause of that event, is admissible. And that although, generally, the declarations must be contemporaneous with the event, yet where there are connecting circumstances, they may, even when made sometime afterwards, form a part of the whole *res gestae*.

In the *State v. Dominique*, 30 Missouri, 585, it did not appear when the

injury was inflicted. It was held that "a declaration made by a child two days before its death to a person who inquired of him the swollen appearance of his face, that 'papa did it,' was not admissible in evidence against the father on his trial for the murder of the child, the declaration not being a part of the *res gestae* nor being made in *articulo mortis*."

The answer of the accused to a question asked subsequent to the commission of the offense is no part of the *res gestae*, and is inadmissible in his favor. *Bolles v. The State*, 1 Morris's State Cases, 593.

Where the prisoner sought to show what he said to a policeman the day after he was arrested for a crime, held it was not a part of the *res gestae*. *Real v. People*, 55 Barb., 551, 575, affirmed, 42 N. Y., 270. So the prisoner's declarations, shortly after the act, of his want of memory of the transaction are not admissible. *People v. Montgomery*, 13 Abb. Prac. Rep., N.S., 210.

In *Forrest v. The State*, 21 Ohio St. Rep., 641, it was held not to be competent for a defendant, on a trial for murder, to prove declarations made by himself, immediately after the homicide in regard to the fact of the homicide, and the circumstances attending it. That such declarations form no part of the *res gestae*, but are simply a narrative made by the defendant in regard to a past transaction.

In *Hamilton v. The State*, 36 Ind., 280, the defendant was indicted for assaulting the prosecutor with intent to rob him. A witness who was present at the transaction, testified that while the prisoner was beating the prosecutor he told the witness that three years before, the prosecutor had assaulted him and drawn a pistol on him, and he, the prisoner, was now having his revenge for it. It was held error for the court to instruct the jury, that the declaration of the defendant was not to be considered by them as evidence of the intent with which the assault was committed.

"The declarations of the defendant, made at the time of the shooting, as to the effect of his shot, are not 'confessions in the technical sense,' but connect themselves with the act, and form part of the *res gestae* and are clearly admissible in evidence." *Head v. The State*, 2 Morris's State Cases, 1700.

In *Comfort v. People*, 54 Illinois, 404, the defendant was indicted for stealing

a watch. It was proven on the part of the people that the prisoner, being in possession of the watch a short time after it was stolen, met a pawnbroker away from his place of business and proposed to pledge the watch as a security for a loan of money. Thereupon the parties went together to the pawnbroker's shop, where the prisoner received the money and placed the watch in pledge. It was held competent for the prisoner to prove all that was said by him, when he first approached the pawnbroker, in connection with the subject, and as to the manner in which he obtained the watch, not only as a part of the *res gestæ*, but as a part of the conversation, to be given such weight by the jury, as from all the evidence in the case, it might seem entitled.

In the *Commonwealth v. Eaton*, 8 Philadelphia Reports, 428, the court said: "The third reason relates to the occurrence at Sullivan's tavern. It was there that the difficulty between Heenan and Trainer, in which Eaton took part, first began, and events rapidly succeeded each other until Heenan was shot. These events were the withdrawal of Eaton, Trainer and Nellis from Sullivan's tavern; then three men, of whom Eaton was one, were seen going up Prune street, towards the Carpenter House, which was kept by Trainer; that the firing of pistols was heard in that direction; that shortly afterwards several men came down Prune street to Fifth, and went down Fifth street to Spruce; that these persons, among whom were Eaton and Trainer, first went to Sullivan's tavern, and finding it shut, went in search of Heenan to Smith's tavern at the opposite corner, where Heenan was, where the difficulty

with Heenan was renewed, and where Eaton became a principal actor in the difficulty, which resulted in a very few minutes in the firing of the fatal shot that mortally wounded Heenan. All this occurred in a very short space of time. These events so naturally connect themselves together, and with the difficulty at Sullivan's tavern, that to exclude it would leave unexplained the cause of the difficulty, and to omit the very first of the fatal series of acts which resulted in the death of Timothy Heenan." See Roscoe's Crim. Evidence (6th Am. ed.), 23, and seventh Eng. ed., p. 23; Best on Ev., 628, 641, 5th Eng. ed.; Powell on Ev., 119, 3d Eng. ed.

In the *Queen v. Petherick*, 7 Cox., 70, the defendant was indicted for burning and causing to be burned certain authorized versions of the Holy Scriptures. The heap of books, amongst which it was alleged were the copies in question, was burned by direction of the defendant. It was proposed to give in evidence a statement (not in the prisoner's hearing) made by a boy, who was one of a crowd at a fire, and was engaged in throwing books into the blaze. There was no evidence of this boy having been retained by the defendant or his having received any directions on the subject. Held (by Crompton, J., and Greene, B., Dublin Commission Court), that such statement was not admissible as a part of the *res gestæ*, and did not come within those classes of cases, as riots and conspiracies, in which such statements would be evidence as it did not appear that the accused and the person whose statement was offered in evidence were engaged in an unlawful act with a common unlawful object.

[12 Cox's Criminal Cases, 231.]

July 29, 1872.

OXFORD CIRCUIT. STAFFORD SUMMER ASSIZES.

(Before Mr. Justice Quain.)

REG. v. WALTER BOOTH.

[231

24 & 25 Vict. c. 100 s. 55 — *Abduction — Motive — Evidence.*

One who takes an unmarried girl under the age of sixteen years out of the possession and against the will of her father or mother, is guilty of an offence

* Reported by JOHN ROSE, Esq., Barrister-at-law.

4 ENG. REP.]

66

24 & 25 Vict. c. 100, s. 55, although he may not have had any bad motive in taking her away, nor means of ascertaining her age, and although she was willing to go.

PRISONER was indicted for the abduction of Mary Ann Johnson, an unmarried girl under sixteen years of age.

H. D. Greene prosecuted.

Kenealy, Q.C., defended the accused.

The prosecutor's daughter, a girl of about fifteen years old, was in the employ of the prisoner, a manufacturer, who induced her to leave her home, without the knowledge or consent of her parents, and, by proposing marriage, to accompany him by train to a town about thirty miles distant, where he left her at a respectable house. She went away with him willingly, and, following his instructions, told the people with whom she was lodged that her father had threatened to send her to a convent. The girl was recovered *virgo intacta*. It appeared that the prisoner was a married man, of excellent character, and that the prosecutor was a Roman Catholic.

The defence raised was that the prisoner, actuated by religious and philanthropic motives, had taken the girl from her parents in order save her from seclusion in a convent; and that he had no means of ascertaining her age.

QUAIN, J., summed up.—The prisoner is indicted under 24 & 25 Vict. c. 100, s. 55, which enacts that "whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the [232] *will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." The law is perfectly clear, and well established by decisions upon that section. You have nothing to do with what was the prisoner's motive in taking this girl away. It is utterly immaterial whether he thought her eighteen years of age or less. If he undertook the responsibility of taking an unmarried girl out of her father's house, though she consented to go, and he had no bad motive, and although he did not know her to be under the age of sixteen, he is responsible for his act. His motives, his philanthropy, and the fact that she was willing to go, have nothing to do with the question before you. It was said by the learned counsel for the prisoner that this statute was procured by the Bishop of Oxford; if it were so, I venture to add publicly that we are all deeply indebted to the right reverend prelate for the same. That a man should interfere in another's household, invade the sanctity of his home, and deprive parents of their child from motives of philanthropy, would be a most dangerous doctrine. What right has a man to go into his neighbor's house and interfere between a child and par-

ents, who are by nature the proper persons to protect their offspring? Even if the father had wished to place her in a convent, what was that to the prisoner? Are there no magistrates and officers of the law to whom the girl might appeal if her father exerted his authority wrongfully? I think the provisions of this statute afford an excellent protection to every man's house. The real issue for you to try is simply this: was the girl induced to leave her father's house by Booth? Was she taken out of the possession and keeping of her father without her father's consent? That she left without her father's or mother's consent is clear. Did he take her away?

Verdict guilty. Sentence eighteen months' imprisonment.

See *Reg. v. Mycock*, 3 Eng. Rep., 177, and note p. 180, and the case of the *Wakefield's* 2 Townsend's State, Tr., 112. The statute of Michigan which provides for the punishment of any one who takes or entices any female under sixteen years of age from her father, mother, guardian,

etc., without their consent, either for the purpose of prostitution, concubinage or marriage, was intended to cover every purpose of unlawful enticement of such female to sexual intercourse. *People v. Bristol*, 23 Mich., 118.

(12 Cox's Crim. Cases, 233).

July 29, 1872.

OXFORD CIRCUIT, STAFFORD SUMMER ASSIZES.

(Before Mr. Justice Quain).

REG. v. JAMES YATES.

[233]

Libel — Pleading — Indictment — Inuendo.

An indictment which charged that the prisoner printed and published a libel of and concerning B. O., the prosecutor, according to the tenor and effect following, viz.: "B. O. of C. (meaning the said B. O.), Game and Rabbit Destroyer, and his wife (meaning Charlotte, the wife of the said B. O.), the seller of the same in country and town"—

Held bad, for want of inuendoes, or averments showing that the words alleged to be defamatory charged an indictable offence, or had reference to the calling of the prosecutor.

INDICTMENT charged that James Yates, unlawfully and maliciously contriving and intending to injure, vilify, and prejudice one Benjamin Oakley, and to deprive him of his good name, fame, credit, and reputation, and to bring him into public contempt, scandal, infamy, and disgrace, on the 19th of March, A.D. 1872, unlawfully and maliciously did print and publish, and cause and procure to be printed and published, a false, scandalous, malicious, and defamatory libel, in the form of a handbill, containing divers false, scandalous, malicious, and defamatory

*Reported by John Rose, Esq., Barrister-at-law.

1872

Reg. v. Yates.

matters and things of and concerning the said Benjamin Oakley, according to the tenor and effect following (that is to say): "B. Oakley, of Chillington (meaning the said Benjamin Oakley), Game and Rabbit Destroyer, and his wife (meaning Charlotte, the wife of the said Benjamin Oakley), the seller of the same in country and town," he, the said James Yates, then well knowing the said defamatory libel to be false, to the great damage, scandal, and disgrace of the said Benjamin Oakley, and against the peace, &c.

Underhill, for the prisoner, applied to the court to quash the indictment. The alleged libel set out therein was not a libel. 234] It *did not impute to the prosecutor any indictable offence nor anything against his character in a particular capacity, nor anything which tended to degrade him, or make him ridiculous, or bring him into public contempt. It was consistent with the indictment that the prosecutor might be a man in the habit of killing game without any wrong in so doing.

QUAIN, J. A destroyer of game and rabbits *on his own land* is quite free from blame. There is no averment showing that it is an indictable offence.

Hon. Evelyn Ashley, for the prosecution. A written statement is a libel if it conveys to the minds of the persons to whom it is published a libellous defamation of another individual. The prosecutor was a gamekeeper, and the suggestion evidently is that he kills his master's game and his wife sells it improperly. The keeper is called a *Game Destroyer*, an epithet which is only applied to one who kills game improperly. The crime or offence need not be directly charged in the libel, an indirect defamation will suffice: (Archibold, Pleading and Evid. p. 859).

QUAIN, J. I think this indictment is bad. The handbill set out therein is not *prima facie* libellous, and there is no averment or inuendo showing that it charges an indictable offence, or relates to the calling or occupation of the prosecutor.

Indictment quashed.

Attorney for the prosecution, *Glover*, Walsall.

Attorney for the prisoner, *Turner*, Wolverhampton.

[12 Cox's Criminal Cases, 235.]

July 30, 1872.

OXFORD CIRCUIT. STAFFORD SUMMER ASSIZES.

(Before Mr. Justice Quain.)

REG. v. JOHN POWNER.

[235]

Forgery — Process of the Court, 24 & 25 Vict. c. 98 — Indictment — Allegation of "intent to defraud."

24 & 25 Vict. c. 98, s. 28, enacts that "whosoever shall forge or fraudulently alter any process of any court" (with certain exceptions), "shall be guilty of felony."

Held, that an indictment for forgery under that section must allege an intent to defraud.

INDICTMENT charged that John Powner, on the 14th of March, A.D., 1872, feloniously did forge certain process of a Court of Petty Sessions of her majesty's justices of the peace . . . (to wit) an order made and issued by virtue of the provisions of the statute made and passed in the 8th year of the reign of our said lady the queen, entitled, "An act for the further amendment of the laws relating to the poor in England," under the hands and seals of two of her majesty's justices of the peace, ordering one Samuel Easthope, amongst other things, to pay unto one Hannah Shakespeare, the mother of a certain bastard child, the sum of 18s. 8d., being the costs incurred in obtaining the said order; against the form of the statute.

Second count. That the said John Powner having in his custody and possession certain process of a Court of Petty Sessions, to wit (the order aforesaid), afterwards, to wit, on the same day and in the year aforesaid, feloniously did fraudulently alter the said last mentioned process, by erasing the word "sixteen" therein, and substituting therefor the word "eighteen;" against, &c.

Third count. That he, on the same day, did feloniously serve upon the said Samuel Easthope certain forged process of a Court of Petty Sessions, &c., (to wit, the said order), he, the said John Powner, at the time when he so served the said last mentioned forged process, then well knowing the [236] same to be forged; against, &c.

The prisoner, a sergeant of police, having received from the clerk to the justices a bastardy order, wherein the amount of costs was written, 16s. 8d., and being instructed to serve the order upon the person therein named, altered the amount to 18s., served the order, received 18s., and kept back 2s. of it.

*Reported by JOHN ROSE, Esq., Barrister-at-law.

1872

Reg. v. Powner.

At the close of the case for the prosecution, the learned judge called the attention of counsel to the fact that the indictment contained no allegation of an intent to defraud.

George Brown, for the prosecution. The indictment is founded on that part of 24 & 25 Vict. c. 98, s. 28, which enacts that "Whosoever shall forge the seal of any court of record, or shall forge or fraudulently alter any process of any court other than such courts as in the last preceding section mentioned, or shall serve or enforce any forged process of any court whatsoever, knowing the same to be forged . . . shall be guilty of felony." And the court mentioned in the preceding sect. 27, are courts of record or of equity or admiralty in England or Ireland. Sect. 44 of the same act, which says that "it shall be sufficient, in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person . . ." clearly shows that there may be cases where it is not necessary to allege such intent. The indictment is in the words of sect. 28. [QUAIN, J. The second count alleging a fraudulent intention may suffice; but my doubt is with regard to the first count. Is this order "any process of any court" within the terms of sect. 28? "Process" means final "process." In sect. 32 relating to forgery of orders of justices, the words "with intent to defraud" are inserted.] An order of justices to pay money is the process of a court, a proceeding.

Kenealy, Q.C. (*Motteram* with him), for the prisoner, contended that the first count must fail for lack of an allegation of intent to defraud, and that the order was not a "process" within sect. 28.

His lordship told the jury that if the prisoner fraudulently altered the sum from 16s. into 18s., meaning to retain the difference, that would be a forgery, and that service of the order on the person against whom it was made would be an enforcement of it, and left it to them to say whether the prisoner forged or altered and served the instrument with the intention of obtaining and keeping the 2s.

Verdict — *Guilty of fraudulently altering the order.*

QUAIN, J. I am of opinion that the common law definition of forgery must be imported into sect. 28, and that the first count [237] is *bad for not alleging an intent to defraud. But I think judgment will stand upon the second count, which is proved, and that the order of justices was a final process within the meaning of the section. As, therefore, the prisoner has been

convicted of a felony under the second count, it will not be advisable to go on with the other charges. *Sentence, twelve months imprisonment with hard labor.*

[12 Cox's Criminal Cases, 237.]

NORTHERN CIRCUIT.

Manchester, July 30, 1872.

(Before Mr. Justice Brett.)

REG. v. GIBBONS.*

Bigamy — Bond fide belief of death of husband — 24 & 25 Vict. c. 100, s. 57.

A *bond fide* belief by a wife that her husband is dead is no defence to an indictment for bigamy, unless he has been continuously absent for seven years.

Reg. v. Horton (11 Cox C. C., 145, 670), overruled.

THE prisoner, Ann Gibbons, was indicted for bigamy.

Coventry was for the prosecution.

Foard was for the defence.

The first marriage took place in August, 1861, with a man called Henry Gibbons, a gilder by trade. He, after living with her for a few months, left her, saying that he was going abroad. She maintained herself by going out to service, and in the year 1867, she went into the employment of a man called Thomas Fisher, and on the 23d of September in that year she was married to him telling him that she was a widow. From the time her husband left her up to the date of the second marriage she had never seen or heard of him. These being the facts of the case,

BRETT, J., asked the counsel for the prisoner what his defence was.

Foard said that if the prisoner had a *bond fide* belief that her husband was dead, which was a question for the jury, [238 she ought to be acquitted.

BRETT, J. *bond fide* belief will not do unless the first husband has been absent for seven years. The 57th section of 24 & 25 Vict. c. 100, is perfectly clear as to its meaning.

Foard said there were two cases which decided that if there was a *bond fide* belief that the husband was dead, although the seven years had not elapsed, the prisoner was entitled to an acquittal. He cited *Reg. v. Turner* (9 Cox C. C., 145), tried before Martin, B., and *Reg. v. Horton* (11 Cox C. C., 670), tried before Cleasby, B., and in both of these cases the two learned

*Reported by H. F. THURLOW, Esq., Barrister-at-Law.

1872

Reg. v. Madden and Hampton.

judges held that if the prisoner at the time of the second marriage had a *bonâ fide* belief that the first husband was dead, the prisoner ought to be acquitted.

BRETT, J., then consulted Willes, J., who was sitting in the Civil Court, and on the learned judge's return he said that both he and Willes, J., were of opinion that a *bonâ fide* belief that the husband was dead was no defence unless the seven years had elapsed.

Board. Will your lordship grant a case for the Court of Criminal Appeal?

BRETT, J. No; I think the point is quite clear. The words of the statute are express.

(12 Cox's Criminal Cases 239).

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*MIDDLESEX SESSIONS.

October 1, 1872.

(Before Mr. Serjt. Cox).

REG. V. MADDEN AND HAMPTON.

Practice — summing up by counsel.

Where one of two prisoners jointly indicted is defended by counsel, and without claiming his right to sum up by the counsel for the prosecution, the undefended prisoner has addressed the jury, the counsel for the prosecution may not afterwards sum up the case to the jury as against the defendant prisoner.

PRISONERS were indicted for larceny.

Ribton for the prosecution.

Sleigh for Hampton.

Madden was undefended.

At the close of the evidence for the prosecution, the undefended prisoner, whose name was first in the indictment, was called upon for his defence. He addressed the jury, but called no witnesses.

Ribton then claimed to sum up as against the defended prisoner before his counsel addressed the jury. He cited the provisions of 28 & 29 Vict. c. 18, s. 2, which enacts "that if any prisoner is defended by counsel, the judge shall, at the close of the case for the prosecution, ask the counsel for each prisoner if they intend to adduce evidence, and if none of them does so, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case for the purpose of summing up the evidence against such prisoner or prisoners."

He claimed to sum up only as against the prisoner who was defended, and whose defence had not yet been entered upon.

Sleigh objected.

The JUDGE. The application comes too late. The right to sum up is at the close of the case for the prosecution, and before the defence has been entered upon. Here the case for the prosecution was concluded and the defence had begun, and was in part heard. If one prisoner only had been on his trial, it would be quite clear that the prosecution could not sum up now, and the position is not altered by the circumstance that there is another prisoner who has not yet made his defence.

(12 Cox's Criminal Cases, 240).

OXFORD CIRCUIT, STAFFORD WINTER ASSIZES.

November 3 and 4, 1872.

(Before Mr. Justice DENMAN).

REG. v. EDWARD WOODHALL AND HUGH WILKES. [240

24 and 25 Vict. c. 96, s. 42 — *Assault with intent to rob — Indictment for felony — Verdict of a misdemeanor.*

Prisoners were indicted for feloniously assaulting the prosecutor with intent to rob him. The jury found them guilty of an assault, but negatived the intent charged.

Held, that the prisoners could not, upon this indictment and finding, be convicted of a common assault.

EDWARD WOODHALL and Hugh Wilkes were indicted for feloniously assaulting Joseph Glover, on the 30th of September last, at the parish of West Bromwich, with intent to rob and steal from his person certain money.

A. Young prosecuted.

The prisoners were undefended.

The jury found the prisoners guilty of the assault, but not of the intent to rob.

Cur. adv. vult.

Nov. 4. DENMAN, J., said: The jury yesterday, after hearing the evidence, found the prisoners guilty of a common assault, and I have taken time to consider the matter and to look into the law. The conclusion I have arrived at is, that the finding on this indictment in fact amounts to a verdict of not guilty, and that it is not competent for the court, where the charge is one of assault with intent to rob, to convict and sentence the prisoners if the jury find them guilty only of a common assault.

* Reported by JOHN ROSE, Esq., Barrister-at-law.

1872

Reg. v. Jones.

The case is one of considerable nicety, but the result of my examination of the authorities is as I have stated.

His lordship then caused the prisoners to be bound over in their own recognizances to appear at a future sessions to answer any charge of common assault which might be preferred against them.

A verdict of not guilty was recorded.

24 and 25 Vict. c. 96, s. 42 enacts, that "whosoever shall assault any person with intent to rob shall be guilty of felony."

[12 Cox's Criminal Cases, 241.]

November 22, 1872.

241] *COURT OF CRIMINAL APPEAL.

(Before Kelly, C.B., Martin, B., Brett, J., Grove, J., and Quain, J).

REG V. WILLIAM JONES.*

Evidence—Confession—Admissibility—Inducement.

Prosecutrix lost her purse, containing 1*l.* 4*s.*, in a market, and asked the prisoner, who had been standing near her, whether he had seen the purse or seen any one pick it up. He replied that he had not. She, however, suspecting that he had robbed her, gave information to the police. A policeman, a short time after, went in search of the prisoner, and having found him, told him that the prosecutrix had lost her purse, and that it was supposed that he had picked it up, and added, "Now is the time for you to take it back to her." He denied having it, and went with the policeman. As they walked along he commenced making a statement, but the policeman told him to say nothing until they saw the prosecutrix. Having met the prosecutrix after they had walked about 600 yards some conversation took place, and the prisoner was searched, and on a half sovereign being found, the prisoner said to the prosecutrix that he would make it all up to her. Twenty minutes had elapsed between the time of the policeman's remark, "Now is the time to take it back to her" and the prisoner's statement "that he would make it up to her."

Held, that there was no inducement held out to the prisoner, and that his statement or confession that he would make it all up to her was admissible in evidence against him.

CASE reserved for the opinion of this Court at the Midsummer Quarter Sessions for the county of Cardigan, on the 3d of July, 1872.

William Jones was tried upon an indictment charging him with stealing moneys to the amount of 1*l.* 4*s.*, the property of one Edward Rees.

At the trial, it was proved that on the 22d of April, 1872, Mrs. Jane Rees, the wife of the prosecutor, was with her mother in the market at Aberystwith. She there purchased some fowls,

242] *which she paid for with money which she took out of

*Reported by John Thompson, Esq.; Barrister at law.

her purse, and after paying for them, she replaced the purse, containing 1*l.* 4*s.*, composed of two half sovereigns and 4*s.*, in her pocket. At the time when she paid for the fowls, Mrs. Rees observed the prisoner, who she previously knew by sight standing close by and near enough to see her take the money out of the purse, and there was no one but the prisoner near her at the time. Mrs. Rees resided a few yards from the market, and as soon as she got home she searched her pocket, and found her purse and money gone. She immediately returned to the market, and found the prisoner still there. She asked if he had seen the purse or seen any one pick it up. He said he had not; but Mrs. Rees, suspecting from several circumstances that the prisoner was the person who had robbed her, gave information to Sergt. Evans, of the Aberystwith county police, who went in search of the prisoner, and found him between six and seven o'clock the same evening, in the Welsh Harp public house, Aberystwith.

The evidence of Sergt. Evans, who was called as a witness for the prosecution, was as follows: I found the prisoner at the Welsh Harp and called him out; I said Mrs. Rees had lost her purse, and that it was supposed he had picked it up. I said, "Now is the time for you to take it back to her." He denied having it, and used very strong language. This took place outside the Welsh Harp, in the street. I asked him what money he had; he said, eighteenpence. I went with prisoner to Great Dark street. He commenced making a statement. I said, "Say nothing now until we see Mrs. Rees." At the end of Market street we met Mrs. Rees and Elizabeth James. When we got up to them the prisoner said, "Do you say I have got your money?" She replied, "No, I do not say so; but you were the only person who was near me at the time I had lost it." He then declared he had not seen it, and said, "Might God strike him dead if he had seen it." I then said to him, "William, what money do you say you have about you?" He replied, "eighteen pence." Being close by the yard, I said to him, "Come in here; if you are honest you will be none the worse for being searched." He then walked into the yard, Mrs. Rees being then close behind us. I said to him again, "Now, eighteenpence, you say, is all you have about you." He put his hands in his pocket and pulled out half a crown, a shilling, sixpence, and three halfpence. I counted the money, and said to him, "William, there is more than 1*s.* 6*d.* here." He replied, "Oh, yes, there is a half a crown; I had forgotten about that." I then placed my hand in the prisoner's pocket, and found half a sovereign in gold. I said, "William, what is this?" He held down his head, and in a few seconds went

forward to Mrs. Rees, and, crying, said, "Mrs. Jones (Mrs. Ree's name before her marriage), dear, I will make it all up to you." I had said to the prisoner, "Now is the time to take it back to her," twenty minutes before the time when the prisoner said to Mrs. Rees that he would make it all up to her. It 243] *is a distance of about 600 yards between the Welsh Harp and the place where the prisoner made this remark to Mrs. Rees.

Upon this evidence it was objected by the advocate for the prisoner that the remark of Sergt. Evans to the prisoner, "Now is the time for you to take it back to her," amounted to an inducement, and was therefore inadmissible in evidence against him.

The court overruled these objections, and left the evidence of Sergt. Evans, with the rest of the case, to the jury, who found the prisoner guilty.

Upon the application of the advocate for the prisoner, the court decided to reserve the question of law for the consideration of the Court for Crown Cases Reserved, whether, upon the above facts, the statements made by the prisoner were admissible in evidence against him, and whether the prisoner was properly convicted; and, in the meantime, sentence was postponed, and the prisoner liberated on bail.

(Signed) C. MARSHALL GRIFFITH,
Chairman of the Cardiganshire Quarter Sessions.

No counsel appeared for the prisoner.

Blofield, for the prosecution. Two points arise. First, was there any inducement to confess by a promise or threat held out to the prisoner? Secondly, was the confession involved in the statement made by the prisoner, that he would make it all up to the prosecutrix, caused by the inducement, there being an interval of twenty minutes? As to the first point; the words of the policeman, "Now is the time for you to take the purse back to her" (the prosecutrix), do not import any promise or threat to the prisoner to confess. [He was then stopped by the court.]

KELLY, C. B. It is quite clear that these words import no promise or threat to the prisoner to confess.

The other judges concurred.

Conviction affirmed.

[12 Cox's Criminal Cases, 257.]

January 18, 1878.

*COURT OF CRIMINAL APPEAL. [257]

(Before Cockburn, C. J., Bovill, C. J., Kelly, C. B., Martin, B., Bramwell, B., Keating, J., Blackburn, J., Mellor, J., Pigott, B., Lush, J., Brett, J., Cleasby, B., Grove, J., Denman, J., and Archibald, J.)

REG. v. ELIZABETH BIRD. *

Larceny — Indictment — Description of money.

An indictment charged the stealing of "nineteen shillings in money" of the moneys of A. B. It appeared that A. B. got into a merry-go-round at a fair, and handed the prisoner a sovereign in payment for the ride, asking her to give change. The prisoner gave A. B. 11d., and said she would give the rest when the ride was finished. After the ride was over the prisoner said A. B. only gave her 1s., and refused to give her the 19s. change.

Held that the prisoner could not be convicted upon this indictment of stealing 19s.

CASE reserved for the opinion of this court at the General Court of Quarter Sessions for the county of Buckingham, holden at Aylesbury, in the said county, on the 15th of October, 1872.

Elizabeth Bird was tried upon an indictment, which charged that she, the said Elizabeth Bird, "on the 12th of October, 1872, 19s. in money, of the moneys of Maria Lovel, feloniously did steal, take, and carry away, against the peace of our lady the queen, her crown, and dignity."

It was proved that the said Elizabeth Bird was the daughter of a man who travelled about to fairs with a "shooting gallery," and a "merry-go-round" or "revolving velocipede machine," for riding on which he made a charge of 1d. to each person for each ride.

On the day in question the said Maria Lovell got into the "merry-go-round," which was then in charge of the said Elizabeth Bird, and handed to the said Elizabeth Bird a sovereign in payment for the ride, asking her to give her the change. The said Elizabeth Bird, thereupon, handed to the said Maria Lovell 11d., and said that she would give her the rest of the change when the ride was finished, as the "merry-go-round" [258 was then about to start. The said Maria Lovell assented to this, and about ten minutes after, when the ride was over, she found the said Elizabeth Bird, who was then attending to the shooting gallery, and asked her for her change, to which the said Elizabeth Bird replied that she had only received from her 1s., for

* Reported by JOHN THOMPSON, Esq., Barrister-at-law.

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which she had given the proper change, and she declined to give any more.

Upon these facts it was contended by the counsel for the prisoner — first, that the prisoner could not be convicted of stealing the 19s., because no specific 19s. had ever been appropriated as the change for the sovereign handed to the prisoner, nor had there been a taking, either actual or constructive, of the 19s. from the said Maria Lovell; secondly, that under the above form of indictment, the prisoner could not be convicted of stealing the sovereign; and that even if the indictment was sufficient, there was no evidence of a felonious taking of the sovereign, as it was not taken from Maria Lovell against her will, and further, that the prisoner could not be convicted of larceny of the sovereign, as a bailee, because, assuming that there was any evidence of a bailment, which was denied, the bailment was not to re-deliver the same money which was delivered to the prisoner.

I overruled the objections, and directed the jury that if they were satisfied that the said Maria Lovell gave the prisoner the sovereign, and that she knew it, and willfully refused to give the said Maria Lovell the remainder of the change, they might properly convict the prisoner of stealing the 19s.

The jury having returned a verdict of guilty, I reserved the above points for the consideration of the Court for the Consideration of Crown Cases Reserved, and judgment was in the meantime postponed and the prisoner admitted to bail.

The question for the opinion of the court is whether, under the circumstances above stated, the prisoner was properly convicted on the above indictment.

Dated this eleventh day of November, 1872.

(Signed) BUCKINGHAM AND CHANDOS,
Chairman of the above Court of Quarter Sessions.

The case was first argued in the Court for the Consideration of Crown Cases Reserved, before Kelly, C.B., Martin, B., and Brett, Grove, and Quain, JJ., who directed it to be argued before all the judges.

Graham for the prisoner. The conviction can be supported. First, there was no larceny of the sovereign, because the prisoner was not bound to return it to the prosecutrix. To make the prisoner a fraudulent bailee she must have been bound to return the sovereign in specie: (*Reg. v. Hassell*, L. & C., 58, 8 Cox C. C., 491; *Reg. v. Garrett*, 2 Fos. & Fin., 14; *Reg. v. Hoare*, 1 Fos. & Fin., 647.) [BLACKBURN, J. May the prisoner not have been a bailee of the sovereign subject to her right of lien on it 259] *for 1s? Not here, as the sovereign was handed to the

prisoner with the intention that it should become her property, and credit was given to her for the change.

[COCKBURN, C.J. Was there any intention to part with the sovereign?] It is submitted that there was: (*Reg. v. Thomas*, 9 Car. & P., 741; *Rex v. Harvey*, 1 Leach C. C., 467; *Parke's case*, 2 East P. C., 671; *Reg. v. Oliver*, Bell C. C., 287; Cox C. C., 384; *Reg. v. Prince*, 11 Cox C. C., 145; L. Rep. C. C. R., 150; *Walsh's case*, Rus. & Ry., 215; *Reg. v. Reynolds*, 2 Cox C. C. 170; *Rex v. Nicholson*, 2 Leach C. C., 610). If the prosecutrix intends to part with the property, the mere fact that the possession was obtained by a fraud does not make the offence larceny: (*Rex v. Jackson*, 1 Mood. C. C., 119; *Rex v. Atkinson*, 2 East P. C. cap. 16, sect. 104; *Reg. v. North*, 8 Cox C. C., 433; *Reg. v. Williams*, 7 Cox C. C., 355; *Reg. v. M'Kale*, 37 L. J. 97, M. C.; 11 Cox C. C., 32). [COCKBURN, C.J. Suppose the prosecutrix never intended to part with the property in the sovereign until she got the 19s. change? MELLOR, J. Was there a voluntary parting with her entire interest in the sovereign? BLACKBURN, J. The prosecutrix never thought of giving the prisoner credit for the 19s. KELLY, C.B. The real question is was this but one transaction, a few minutes elapsing while the machine was going round is immaterial.] It is contended that the property in the sovereign was parted with, and that the prosecutrix could not have maintained an action to recover it, as she never intended to have that sovereign returned to her. Secondly, the conviction for stealing 19s., as alleged in this indictment, cannot be sustained. Before the 14 & 15 Vict. c. 100, s. 18, it was necessary to allege in the case of money stolen the specific coins, and it was customary to charge the stealing of so many pieces of the current coin of the realm called sovereigns, shillings, &c., as the case might be, and it was necessary to prove that some one of the specific coins alleged was stolen. To remove difficulties that had arisen on this state of the law, sect. 18 enacts that "in every indictment in which it shall be necessary to make any averment as to any money, &c., it shall be sufficient to describe such money, &c., simply as money, without allegation so far as regards the description of the property, specifying any particular coin, and such allegation so far as regards the description of the property, shall be sustained by proof of any amount of coin, although the particular species of coin, of which such amount was composed shall not be proved. Now, under the allegation of stealing 19s. in this indictment, the prisoner could not be convicted of stealing a sovereign. That was a variance. The prosecutrix was bound to prove that shillings had been stolen. Having particularized the money stolen, it should have been proved that shilling pieces were stolen.

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[GROVE, J. The allegation is not nineteen pieces of the current coin called shillings, but 19s. in money. BLACKBURN, J. That means, I should say, money to the value of 19s.] The word shilling must be taken as descriptive of the thing stolen, and 260] *must be proved: (Archb. Crim. Pleadings, 190 (edit. 1862); *Reg. v. Deeley*, 1 Moo. C. C., 303; *Reg. v. Owen*, 1 Moo. C. C., 118; *Reg. v. Craven*, Rus. & Ry., 46; *Reg. v. West*, Dears. & B., 109; 7 Cox C. C., 183; *Reg. v. Bond*, 1 Den. C. C.; *Reg. v. Jones*, 1 Cox C. C., 105).

No counsel appeared for the prosecution.

The judges retired to consider, and on their return into court,

COCKBURN, C.J., said: The majority of the judges are of opinion that the prisoner was not properly convicted of stealing the 19s. charged in the indictment, for she had not taken them from the prosecutrix, and could not therefore be convicted on this indictment. The majority of the judges do not say that she might not have been convicted on an indictment charging her with stealing the sovereign if the issue had been properly left to the jury.* Upon the present indictment, however, she must be discharged. *Conviction quashed.*

(12 Cox's Criminal Cases, 260).

January 18, 1873.

COURT OF CRIMINAL APPEAL.

(Before Cockburn, C. J., Bovill, C.J., Kelly, C.B., Martin, B., Bramwell, B., Keating J., Blackburn, J., Mellor, J., Pigott, B., Lush, J., Brett, J., Cleasby, B., Grove, J., Denman, J., and Archibald, J.)

REG. v. MIDDLETON.†

Larceny — Parting with possession under mistake — Animus furandi.

A depositor in a post office savings bank obtained a warrant for the withdrawal of 10s., and presented it with his depositor's book to a clerk at the post-office, who, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for 8l. 16s. 10d., and placed that sum upon the counter. The clerk entered 8l. 16s. 10d. as paid in the depositor's book, and stamped 261] it. The depositor took up that sum and went *away. The jury found that he had the *animus furandi* at the moment of taking money from the counter, and that he knew the money to be the money of the postmaster-general when he took it up, and found him guilty of larceny:

Held, by a majority of the judges, that he was properly convicted of larceny.

* In *Reg. v. Gumble*, ante, a similar case to this, the court below amended the indictment, and substituted a sovereign for 19s. 6d., and the Court for the Consideration of Crown Cases Reserved, affirmed the conviction.

† Reported by JOHN THOMPSON, Esq., Barrister-at-law.

CASE reserved for the opinion of this court by the deputy recorder of the city of London.

At the session of the Central Criminal Court held on Monday, 23d Sept. 1872, George Middleton was tried before me for feloniously stealing certain money to the amount of 8*l.* 16*s.* 10*d.*, the moneys of the postmaster-general.

The ownership of the money was laid in other counts in the queen and in the mistress of the local post-office.

It was proved by the evidence that the prisoner was a depositor in a post-office savings bank, in which a sum of 11*s.* stood to his credit.

In accordance with the practice of the bank he duly gave notice to withdraw 10*s.*, stating in such notice the number of his depositor's book, the name of the post-office, and the amount to be withdrawn.

A warrant for 10*s.* was duly issued to the prisoner, and a letter of advice was duly sent to the post-office at Notting-hill to pay the prisoner 10*s.* He presented himself at that post-office and handed in his depositor's book and the warrant to the clerk, who, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for 8*l.* 16*s.* 10*d.*, and placed upon the counter a 5*l.* note, three sovereigns, a half sovereign, and silver and copper, amounting altogether to 8*l.* 16*s.* 10*d.*

The clerk entered the amount paid, viz., 8*l.* 16*s.* 10*d.*, in the prisoner's depositor's book, and stamped it, and the prisoner took up the money and went away.

The mistake was afterwards discovered, and the prisoner was brought back, and upon being asked for his depositor's book said he had burnt it.

Other evidence of the prisoner having had the money was given.

It was objected by counsel for the prisoner that there was no larceny because the clerk parted with the property and intended to do so, and because the prisoner did not get possession by any fraud or trick.

The jury found that the prisoner had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the postmaster-general when he took it up.

A verdict of guilty was recorded, and I reserved for the opinion of the Court for Crown Cases Reserved the question whether, under the circumstances above disclosed, the prisoner was properly found guilty of larceny.

*I discharged the prisoner on recognizance with sureties [262 to appear and receive judgment when called upon.

(Signed)

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No counsel appeared for the prisoner.

The *Attorney-General* (*Metcalf* and *Slade* with him) for the prosecution.

It is submitted that the prisoner was properly found guilty of larceny. The facts bring the case within the definition of larceny by Bracton, bk. 3, c. 32, p. 150. "*Furtum est secundum leges, contractatio rei aliene fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit. Cum animo dico, quia sine animo furandi non committitur.*" Here the prisoner took the 8l. 16s. 10d., which he at the time knew not to be his own, and to belong to the postmaster-general, and without the consent of the postmaster-general. It is not a satisfactory test of whether a fraudulent taking is larceny to see whether upon the facts an action of trespass would lie for the taking, as has been sometimes said it is. If a person finds a check in the street and takes it up, that is not a trespass, but if he applies it to his own use it is. The present case cannot be put higher than a finding, and if so, the prisoner was guilty of larceny. The case of *Merry v. Green* (7 M. & W. 623), shows that. That was an action of false imprisonment, and the defendant pleaded a justification on the ground that the plaintiff had committed a larceny. The facts were, that the plaintiff had purchased at a public auction a bureau, which contained a secret drawer, wherein was a purse and money, which he appropriated to his own use, and it was held that if the plaintiff had express notice that the bureau alone, and not its contents (if any) was sold to him, or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use; but that if he had reasonable ground for believing that he bought the bureau with its contents (if any), he had a colorable right to the property, and it was no larceny. Parke, B., delivered the judgment, and in the course of it said: "It was contended that there was a delivery of the bureau and the money in it to the plaintiff as his own property, which gave him lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us that though there was a delivery of the bureau, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendor to receive it, both were ignorant of its existence, and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this. It is said that the offence cannot be

263] larceny unless the taking would be a trespass, *and that is

true; but if the finder, from the circumstances of the case, must have known who was the owner, and, instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass. And it seems, also, from *Wynne's case* (Leach C. C., 413; 2 East P. C., 664), that if under the like circumstances he acquire possession and mean to act honestly, but afterwards alter his mind and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny."

[BRAMWELL, B. Suppose in this case the postmaster general had brought an action of trespass, and the defendant had pleaded not guilty and leave and licence, could he have made out a defence?] No. It is clear that if the prisoner had obtained the possession by any act or word amounting to misrepresentation, it would have been a case of larceny; but because he was silent, and took advantage of a mistake on the part of the clerk, is it to be said that it was not a larceny? [COCKBURN, C.J. In *Rex v. Oliver*, cited in 4 Taun., 274, the prisoner offered to give the prosecutor gold for bank notes, upon which the prosecutor put down a number of bank notes for the purpose of their being so exchanged. The prisoner took up the notes and made away with them, and this was holden to be larceny, if the jury believed that the prisoner intended to run away with the notes and not to return with the gold.] In this case the jury found that the prisoner took the 8*l.* 16*s.* 10*d.* from the counter *animo furandi*. [BRETT, J. Was the taking here against the will of the owner? The clerk had a general authority to pay the warrant.] There is nothing to show that he had any authority to part with the 8*l.* 16*s.* 10*d.*, except to the person to whom it belonged. His duty was to pay in accordance with the letter of advice in each case. In *Reg. v. Prince* (L. Rep. 1 C. C. R., 150; 11 Cox C. C., 193), where it was held that money knowingly obtained on a forged check from a cashier at a bank is not larceny, Blackburn, J., said, "as the law now stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority coequal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intended to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession the offence so committed will be larceny." [BRETT, J. What difference is there between a clerk at the post office

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and a clerk in the bank? COCKBURN, C.J. This was the mistake of a person who stood *in loco* of the owner.] In *Reg. v. Longstreeth* (1 Moo. C. C., 137), it was held that obtaining *animus furandi* a parcel from a carrier's servant by falsely pretending to be the person to whom it was directed is larceny.

264] *The following cases were also referred to: *Reg. v. Campbell* (1 Moo. C. C., 179), *Clough v. London and North Western Railway Company* (41 L. J. 17, Ex.), *Reg. v. West* (Dears, 402, 6 Cox C. C., 415), *Reg. v. Glyde* (11 Cox C. C., 103, 37 L. J., 107, M. C.) *Cur. adv. vult.*

Jan. 25. KELLY, C. B., said the majority of the judges were of opinion that the conviction should be affirmed. The reason for the judgment will be delivered at a future day.*

Conviction affirmed.

(12 Cox's Criminal Cases, 264).

COURT OF CRIMINAL APPEAL.

January 25, 1878.

(Before KELLY, C.B., MELLOR, J., PIGOTT, B., DENMAN, J., and POLLOCK, B.)

REG. v. JOHN JOHNSON.†

Perjury—Deputy coroner—Jurisdiction—Inquisition 6 & 7 Vict. c. 83.

On the trial of an indictment for perjury committed at an inquest before the deputy coroner, evidence was given, by the prosecution that the coroner, who was also a county court registrar, was absent on his vacation, a vacation and air and exercise having been recommended by medical advisers for his health, which had become permanently impaired. It also appeared that the coroner, during his absence, spent three or four days every week in shooting, and that by far the greater number of inquests held in the district were held by the deputy coroner.

Held, that it was a question for the judge, and not for the jury, whether the coroner was absent at the time for a lawful or reasonable cause, within 6 & 7 Vict. c. 83, s. 1.

Held, also, that the inquisition was valid, and that the deputy coroner, was lawfully acting at the time (sect. 2 of same statute).

CASE reserved for the opinion of this court by Denman, J., at the last Winter Assizes for the county of Durham.

265] *John Johnson was tried and found guilty of perjury, subject to the opinion of this court upon the following case:

The perjury alleged was committed by false oaths taken before Thomas Dean, who held an inquest, as deputy coroner, touching the death of one Owen O'Hanlon.

* Although the reasons have not yet been given it is thought useful to publish the decision now on account of its practical nature.

† Reported by JOHN THOMPSON, Esq., Barrister-at Law.

Thomas Dean was called and produced an appointment, dated 1866, of himself as deputy coroner for Darlington ward. This appointment was duly signed and sealed by William Dale Trotter, the then present coroner for the said ward, and properly countersigned as required by law.

The inquest was opened on the 11th of October, 1872, and continued by adjournment from time to time on several days up to and after the 7th of November, the day of the perjury in question.

The said Thomas Dean, upon cross examination, and the said coroner, who was also examined, proved that since 1866 by far the largest number of all the inquests held in Darlington ward had been held by the said Thomas Dean, as deputy coroner. That on the 11th of October, when the inquest in question commenced, the said coroner, who was also an attorney in practice, and registrar of the county court, and held other offices, was absent from his home and usual place of business as an attorney, having left home on the 24th of September previous, in order to take a vacation until the 14th of October, such absence and vacation, and air and exercise, having been recommended to him by medical advisers as necessary for his health, which had become permanently impaired from an operation which he had undergone some eighteen months previously. That between the last mentioned dates he spent three or four days every week in shooting. That owing to his engagements as registrar of the county court the above period was the only time of the year during which he could obtain any vacation, that being the period appointed for the vacation of registrars of county courts. Mr. Trotter also stated that when the inquest in question began he was not in such a state of health as to be able properly to discharge the duty of holding an inquest of the kind and duration of which that in question appeared likely to be.

Upon these facts it was contended, on behalf of the prisoner, that the proceeding before the said Thomas Dean was *coram non judice*, because it was incumbent on the prosecution, in order to show jurisdiction in a deputy coroner, to administer an oath to prove affirmatively that there was lawful or reasonable cause for the absence of the coroner (citing 6 & 7 Vict. c. 83, s. 1, proviso 2), and that the facts here did not amount to any evidence of such cause. He also contended that the question was one for the jury and not for me.

The counsel for the crown contended, that even if the facts proved were insufficient to show that there was lawful or reasonable cause, still, inasmuch as by sect. 2 of the same act, it is provided that inquisitions are not to be quashed by reason of

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266] *their having been taken by a deputy, the oath, on which the perjury was assigned, being an oath on which a good inquisition might have been founded, could not be said to be *coram non judice*, but was one legally administered in a judicial proceeding, and therefore one on which perjury could be legally assigned.

I held, that, even assuming it to be for the prosecution to make out affirmatively in such a case, that there was lawful or reasonable cause for the absence of the coroner (which point, however, I reserved for this court) there was in this case such lawful or reasonable cause, but I reserved for this court the question whether there was evidence upon which I could properly so hold.

The first question of law reserved for the opinion of this court is whether it was incumbent upon the prosecution to make out that there was lawful or reasonable cause for the absence of the coroner from the inquest in question. If it was not, the conviction to stand. If it was, then the second question reserved is whether it was for me or for the jury to decide whether there was such lawful or reasonable cause. If for the jury, the conviction to be quashed unless the first question be decided in the negative. If for me, then the third question reserved is whether there was evidence upon which I might properly decide as I did. If so, the conviction to stand. If not, to be quashed unless the first question be decided in the negative.

I sentenced the prisoner to eighteen month's imprisonment, and refused to admit him to bail.

The 6 & 7 Vict. c. 83, s. 1, enables a coroner to nominate and appoint from time to time a fit and proper person (such appointment being subject to the approval of the lord chancellor) to act for him as his deputy in the holding of inquests. Provided that a duplicate of such appointment shall be transmitted to the clerk of the peace. Provided also that no deputy shall act "except during the illness of the said coroner, or during his absence from any lawful or reasonable excuse."

Sect. 2 recites that it is expedient to make provisions for supporting coroners' inquisitions and for preventing the same from being quashed on account of technical defects, and enacts that no inquisition found upon or by any coroner's inquest shall be quashed, stayed, or reversed (*inter alia*) nor (except only in cases of murder or manslaughter) "by reason of any such inquisition not being duly sealed or written upon parchment, nor by reason of any such inquisition having been taken before any deputy instead of the coroner himself."

T. C. Foster for the prisoner. The conviction cannot be upheld, for the inquisition was taken *coram non judice*. Before the

6 & 7 Vict. c. 83, there was no power to appoint a deputy coroner in a county. No doubt it must be assumed that the deputy coroner was appointed and his appointment approved by the lord chancellor, but it was not approved at the trial that a duplicate of his appointment had been transmitted to the clerk of the peace.

[*DENMAN, J. No such point was raised on the trial or [267 reserved for this court.] Then, it was not proved that the coroner was so ill as to be unable to attend, or that his absence was lawful and reasonable. On the contrary, it appeared that he was absent on his vacation, and was able to go out shooting. [MELLOR, J. Is the degree of illness material? He was recommended by medical advisers to take air and exercise as necessary for his health. DENMAN, J. The words of the proviso in sect. 1 are "lawful or reasonable absence." At the trial the prosecution did not rely on the illness of the coroner. Was not his absence lawful under the circumstances?] The case finds that by far the greater number of inquests were held by the deputy coroner. [KELLY, C.B. That does not affect this particular inquest: He referred to *Reg. v. Perkin* (7 Q.B. 165).] It was a question for the jury whether the coroner's absence was reasonable or not. [MELLOR, J. It would be very singular if it was a question for the jury whether the cause of absence was a lawful one.] The learned counsel then cited Taylor on Evid. s. 30. Next, as to the effect of the second section of the act. That enactment was passed to cure inquisitions from formal defects. This was an objection to the authority of the judge himself, before whom the inquisition was taken.

Giffard, Q.C. (*R. Luck* with him), for the prosecution was not called upon to argue.

KELLY, C. B. I am of opinion that the conviction must be affirmed. As to the first question, I have no doubt that it was the province of the judge to determine what was a lawful or reasonable cause for the absence of the coroner, and that the judge would have done wrong if he had left that question to be determined by the jury. But independently of that, the case is concluded by sect. 2 of the act. The same question arises now as would have arisen if there had been a proceeding in the Court of Queen's Bench to quash this inquisition. If the inquisition is upheld it follows that the inquest must be taken to have been duly held, and that false evidence given upon it was punishable as perjury. Sect. 2 recites that it is expedient to make provision for supporting coroner's inquisitions, and then enacts that no inquisitions shall be quashed, stayed, or reversed by reason of a number of things specified, and then proceeds, "nor except in

cases of murder or manslaughter by reason of any inquisition having been taken before any deputy instead of the coroner himself." This was a case of perjury and not of murder or manslaughter, and I am of opinion that the inquisition was a valid one within this enactment.

MELLOR, J. I am of the same opinion. I consider that *prima facie* the inquisition must be held to have been lawfully holden before the deputy coroner. But it was said that upon the evidence given it was a question for the jury, and not for the judge, whether there was a lawful or reasonable cause for the absence of the coroner. I think that where the question arises incidentally at the trial like the admissibility of secondary evidence, where it is necessary to show that searches and all reasonable efforts have been made to find the missing document, it is a question to be determined by the judge. At the trial the jurisdiction of the deputy coroner before whom the perjury was committed was disputed on the ground that there was no lawful or reasonable cause for the absence of the coroner. That question was an incidental matter arising at the trial which it was for the judge to decide. But, further, this inquisition is protected by sect. 2 of the statute.

PIGOTT, B. I rest my judgment on the second ground that the inquisition is protected by sect. 2, which must be taken to uphold everything which led to the inquisition. I do not, however, differ from the other members of the court on the first point.

DENMAN, J. It is not necessary to hold that in cases of inquests held by a deputy coroner he must be presumed *prima facie* to be acting legally, and assuming it to be competent to the prisoner's counsel to contend successfully if he can establish it, that if the deputy coroner is not acting in the absence of the coroner from lawful or reasonable cause, there must be an acquittal, I will consider this case. The prosecution took upon itself at the trial to make out that the deputy coroner was duly appointed. The deputy coroner was cross-examined, and the facts stated in the case elicited. It was then said that no evidence of the perjury could be given as the deputy coroner was not properly acting, and no lawful or reasonable cause was shown for the absence of the coroner himself, and that whether the absence was lawful or reasonable was a question for the jury, and not for the judge. I held that it was a question for the judge, and that there was upon the evidence a lawful or reasonable cause for the absence of the coroner on this inquest. When the statute says that when a deputy coroner shall be acting owing to the lawful absence of coroner, it seems clear

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that the question, what is a lawful cause of absence is a question for the judge. But, however, that may be, sect. 2 gives the go-by to that question. That section assumes that there might be some objection to the acting of the deputy coroner, but says that the inquisition shall nevertheless be valid. It follows that the holding of the inquest was a judicial act, and that the false evidence was given in a course of a judicial proceeding.

POLLOCK, B., concurred.

Conviction affirmed.

[13 Cox's Criminal Cases, 269.]

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(Before Kelly, C.B., Mellor, J., Pigott, B., Denman, J., and Pollock, B.)

REG. v. SLOWLY and HUMPHREY.*

Larceny—Goods obtained by Trick—Credul.

Prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which the prisoners got from him, and then refused to restore the onions or pay the price. The jury convicted the prisoners of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them from the beginning.

Held, that the conviction was right.

CASE reserved for the opinion of this court by Mr. Justice Byles.

The prisoners, at the last Winter Assizes for the county of Sussex, at Lewes, were jointly indicted for stealing onions.

The prosecutor, having a cart loaded with onions, met the prisoners, who agreed to buy all the onions at a certain price, viz., 3*l.* 16*s.* for ready money, prisoners saying, "You shall have your money directly the onions are unloaded."

The onions were accordingly unloaded by the prosecutor and the prisoners together, at a place indicated by the prisoners.

The prosecutor then asked for his money. The prisoners thereupon asked for a bill, and the prosecutor made out a bill accordingly. One of the prisoners said they must have a receipt from the prosecutor, and in the presence of the other made a cross upon the bill, put a 1*d.* postage stamp on it, and then said they had a receipt, and refused to restore the onions or pay the price.

*Reported by John Thompson, Esq., Barrister at law.

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The next morning the prisoners offered the onions for sale at Hastings.

The jury convicted both the prisoners of larceny, and said they found that the prisoners never intended to pay for the onions, and that the fraud was meditated by both the prisoners from the beginning. The prisoners' counsel insisting that under these circumstances there was no larceny, I reserved the point for the decision of the Court of Criminal Appeal.

(Signed) J. BARNARD BYLES.

270] * *Willoughby*, for the prisoners. The prisoners were not properly convicted of larceny, for the prosecutor gave credit to the prisoners for the 3l. 16s., and delivered the onions to them on such credit. [Kelly, C.B. What credit was given? The case is like *Reg. v. McGrath* (39 L. J. 7, M. C.; Cox C. C., 347)]. This is a different case. There the money was obtained against the will of the owner. Here the onions were unloaded by the prosecutor. Moreover, it was proved, though not stated in the case, that the prosecutor called on the prisoners in the evening for the money.

The learned counsel then cited 2 East. P. C., 669 (edit. A.D. 1805), and the cases of *Rex v. Harvey* and *Reg. v. Nicholson*, there cited. Also *Rex v. Oliver* (2 Leach, 1072), *R. v. Adams* (2 Rus. on Crimes, 209), *Tooke v. Hollingsworth* (5 T. R., 231, Buller, J.), *Reg. v. Small* (8 C. & P., 46), *Reg. v. Stewart* (1 Cox C. C., 174), *Reg. v. McKale* (37 L. J., 97, M. C.; 11 Cox C. C., 32).

Pocock, for the prosecution, was not called upon to argue.

KELLY, C.B. I am of opinion that the conviction should be affirmed. If in this case it had been intended by the prosecutor to give credit for the price of the onions, even for a single hour, it would not have been larceny, but it is clear that no credit was given or ever intended to be given. Any idea of that is negatived by the statement in the case that the prisoners agreed to buy for ready money. In all such sales the delivery of the thing sold, or of the money, the price of the thing sold, must take place before the other, *i. e.*, the seller delivers the thing with one hand while he receives the money with the other. No matter which takes place first, the transaction is not complete until both have taken place. If the seller delivers first before the money is paid, and the buyer fraudulently runs off with the article, or if, on the other hand, the buyer pays first, and the seller fraudulently runs off with the money without delivering the thing sold, it is equally larceny.

MELLOR, J. I am of the same opinion. The prisoners obtained possession of the onions by a trick, and never intended to pay

for them, as the jury found. From the very first they meditated the fraud to get possession of them, which puts an end to any question of its being larceny or not.

FIGOTT, B. The facts are, that the prosecutor never intended to part with the possession of the onions except for ready money. He did part with the possession to the prisoners, who obtained the possession by fraud. The prisoners then brought in aid force to keep possession, and refused to restore the onions or pay the price. Therefore, the possession was obtained against the will of the prosecutor.

DENMAN, J., and POLLOCK, B., concurred.

Conviction affirmed.

[12 Cox's Criminal Cases, 271.]

*COURT OF CRIMINAL APPEAL. [271]

(Before Kelly, C.B., Willes, J., Cleasby, B., Grove and Quain, JJ.)

April 27, 1872.

REG. v. WATKINSON.*

Pleading—Indictment—Debtors Act—Arrest of Judgment—32 & 33 Vict. c. 62, s. 19.

Quære—whether the Court for the Consideration of Crown Cases Reserved can entertain a question as to quashing an indictment, reserved at the trial.

The Debtors Act (32 & 33 Vict. c. 62), s. 19, enacts: That in indictments for offenses under that act it shall be sufficient to set forth the substance of the offense charged in the words of the act, specifying the offense, "without setting out any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under the Bankruptcy Act, 1860."

Held, that an indictment for misdemeanor framed upon sect. 11, sub-sect. 13, of the act, which enacts, "that if within four months next before the presentation of a bankruptcy petition, the trader by any false representation or other fraud, has obtained any property on credit and has not paid for the same," which merely charged "that a bankruptcy petition was presented against the defendant to the county court, &c., upon which the defendant was adjudged bankrupt, and that the defendant within four months before the presentation of the said petition did by certain false representations obtain from B., on credit, certain property, and has not paid for the same," was sufficient in arrest of judgment under the above statute, and also under Peel's Act (7 Geo. 4, c. 64), s. 20.

CASE reserved for the opinion of this court by Mr. Justice Quain.

Thomas Watkinson was convicted of a misdemeanor at the Spring Assizes for the West Riding of the county of York, holden at Leeds on the 21st of March, 1872. Sentence was

*Reported by JOHN THOMPSON, Esq., Barrister at law.

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postponed and the defendant was admitted to bail, in order that 272] *the opinion of the Court for Crown Cases Reserved should be taken on the following case :

The prisoner was indicted under the Debtors Act, 1869, sect. 11, sub-sect. 13, for that he within four months next before the presentation of a bankruptcy petition against him by certain false representations did obtain property on credit and did not pay for the same.

He was also indicted in other counts of the same indictment, under the same act, sect. 13, sub-sect. 1, for that he did in incurring certain debts and liabilities obtain credit by false pretences.

The following is a copy of two of the counts of the indictment :

The other counts are similar, differing only in the names of the persons from whom the credit or property was obtained.

West Riding of Yorkshire, to wit : The jurors for our lady the queen, upon their oath present that on the 14th of April, 1871, a bankruptcy petition was presented against Thomas Watkinson, to the County Court of Yorkshire, holden at Bradford, and that upon such petition the said Thomas Watkinson was duly adjudged bankrupt by the court aforesaid, upon the 15th of April in the year aforesaid, and that the said Thomas Watkinson within four months next before the presentation of the said bankruptcy petition against him, to wit, on the 20th of February, 1871, did by certain false representations, obtain from one John Bryant on credit certain property, to wit, certain goods to the amount of 70*l.*, and that the said Thomas Watkinson has not paid for the same property, against the form of the statute in such case made and provided, and against the peace, &c.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Watkinson, on the 20th of February, 1871, did in incurring certain debts and liabilities to the said John Bryant obtain credit from the said John Bryant under false pretences, against the form of the statute in such case made and provided, and against the peace, &c.

The counsel for the prisoner moved to quash the indictment on the ground that it was too vague and general. That it would enable the prosecution to prove under it any number of false representations and false pretences. That the counts should have been confined to one false representation or one false pretence. And that the false representations and false pretences, or some of them, ought to have been set out in the indictment, otherwise there would be a difficulty of pleading *autrefois convict* or *acquitted* to such an indictment.

The counsel for the prosecution relied on the Debtors Act, 1869, s. 19, as justifying the form of the indictment. The learned judge reserved for the opinion of this court the question whether the above indictment ought to have been quashed.

Some discussion took place during the argument as to whether this court could entertain the question as left to them, but as Mr. Justice Quain reported that the real point raised was as to whether the indictment was good, the court said the [273] objection would be considered as taken in arrest of judgment.

T. Campbell Foster, for the prisoner. The Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, sub-sect. 13, enacts "that if within four months next before the presentation of a bankruptcy petition against any person, or the commencement of the liquidation, he by any false representation or other fraud has obtained any property on credit, and has not paid for the same, such person shall be deemed guilty of a misdemeanor." Sect. 19 provides that in an indictment for an offense under that act it shall be sufficient to set forth the substance of the offense charged in the words of the act specifying the offense, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under the Bankruptcy Act, 1869." Under this section it is not sufficient to allege, in such a general way as is done in this indictment, that the prisoner did "by certain false representations obtain property on credit and has not paid for the same." That is stating the character but not the substance of the offense. The case is similar to that of an indictment for perjury, in which by the 14 & 15 Vict. c. 100, s. 20, it is enacted that it shall be sufficient to set forth the substance of the offense charged. In that case it would be insufficient to allege merely "that the defendant committed perjury." In *Rex v. Perrott* (2 M. & S. 385), Lord Ellenborough said, "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. The legislature have so held, and have recorded their opinion to that effect in the case of perjury in stat. 23 Geo. 2, c. 11 (by which they relieved the party prosecuting from many of the forms theretofore incumbering the prosecution of that charge), when they enacted that it should be sufficient to set forth the substance of the offense charged, together with the proper averments to falsify the matter wherein the perjury is assigned. The legislature, when they so enacted, must have contemplated a form of prosecution in which the word falsely as a prefatory allegation was generally if not always used; and we must consider them as thinking that not a sufficient allegation to falsify the matter without the proper aver-

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ments." To allege merely that the defendant did, by certain false representations, obtain credit is simply stating the offense by its name. In *Rex v. Mason* (2 T. R., 581), it was holden to be error merely to allege that money was obtained by "false pretences," without specifying them. In *Davy v. Baker* (4 Burr., 2471) a declaration for a bribery penalty was held bad in arrest of judgment, which merely alleged that the defendant "did receive a gift or reward" in the words of the act 2 Geo. 2, c. 24. In *Reg. v. Bell* (12 Cox C. C., 37) a count under the Debtors Act, 1869, s. 13, sub-sect. 1, alleging simply that the defendant did obtain credit from the prosecutor "by means of fraud other than by false pretences," without setting out the means, was 274] *quashed, as being too general. The cases of *Reg. v. Martin* (8 A. & E. 481), *Rex. v. Plestow* (4 Camp., 494), were then cited. Waddy (Wilberforce with him) was not called upon to argue.

KELLY, C.B. It might be doubtful whether this court has power to quash an indictment, and I give no opinion on that point, but upon the report of the learned judge we may treat the point arising upon a motion in arrest of judgment. If it were necessary to rely upon authority, we have only to look to the cases of *Reg. v. Blake* (6 Q. B. 126), and *Reg. v. Mulready*, which are fatal to the objection taken upon this indictment in arrest of judgment. It may be that at common law, and but for sect. 19 of the Debtors' Act, an objection might have been made effectually to the indictment; but the answer to the objection is clear upon sect. 19. The question is whether it is sufficient to sustain the indictment that the offense should be set forth in the words of the act. What the legislature really meant to enact was that it should be unnecessary to set out the proceedings in bankruptcy. It is quite sufficient in stating the offense to adopt the words of the act. Then again, Peel's Act (7 Geo. 4, c. 64), s. 20, is also conclusive against the objection taken in arrest of judgment, as the offence is described in the words of the act. The objection, therefore, fails.

The rest of the court concurring,

Conviction affirmed.

[12 Cox's Criminal Cases, 303.]

*COURT OF QUEEN'S BENCH.

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November 21, 1872.

(Before Cockburn, C.J., Mellor, and Blackburn, JJ.)

Ex parte BOUVIER.

Extradition—Prisoner convicted in France—Surrender to authorities under Extradition Act, 1870 (33 & 34 Vict. c. 52.)

The applicant, who had been an *avoué* in France, was now a prisoner in Jersey. He had been convicted *par contumace*, by the Cour d' Assize de Côtes

du Nord, of three offenses, *abus de confiance*, or breach of trust, fraudulent bankruptcy, and forgery. The first of these three offenses is not one for which a surrender is stipulated by the French treaty of 1843, or by the statute confirming it—viz., 6 & 7 Vict. c. 75, and there has been no extradition treaty with France since. By 33 & 34 Vict. c. 52, s. 3, sub-sect. 2, a fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded." By sect. 4, "an order in council for applying this act in the case of any foreign state shall not be made unless the arrangement. . . (2) is in conformity with the provisions of this act, and in particular with the restrictions on the surrender of fugitive criminals contained in this act. By sect. 27, 6 & 7 Vict. c. 75, amongst other acts, is repealed, "and this act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the acts so repealed) shall apply (as regards crimes committed either before or after the passing of this act), in the case of the foreign states with which those treaties are made, in the same manner as if an order in council referring to such treaties has been made, in pursuance of this act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this act." Affidavits concerning the French law were produced by both sides.

Upon a rule for a *habeas corpus* directing the governor of Jersey *prison³⁰⁴ to produce the applicant, the court expressed doubts as to the exemption of old treaties from the restrictions of the act of 1870. They held, however, that the French law, although the affidavits were contradictory, carried out the restriction provided for.

THIS was a rule calling upon John le Rossignol, governor of Her Majesty's prison in and for the island of Jersey, to show cause why a writ of *habeas corpus* should not issue to have before this court the body of Alfred Louis Marie Bouvier, who was detained in the said prison, to undergo and receive all and singular such matters and things as the court shall then and there consider of and concerning him in this behalf.

It appeared from the affidavits upon which the rule was granted that Bouvier was arrested and lodged in the said prison on the 22d of October, 1872, on a warrant granted under the Extradition Act, 1870, by Her Majesty's principal secretary of state for the home department, and endorsed by the bailiff of the said island of Jersey. On the 24th of October he was taken before the police magistrate of the said island on such warrant, and was by him ordered to be handed over to the French authorities, being in the meantime sent back to prison, there to remain for the period of fifteen days, being the time allowed by the said Extradition Act, 1870, for obtaining a writ of *habeas corpus* or to bring other measures for an appeal from the said order. The warrant had been granted upon a judgment of *La Cour d' Assize de Côtes du Nord*, in France, dated 10th of July, 1872, on which judgment Bouvier had been condemned on three several charges of *abus de confiance*, forgery, and fraudulent bankruptcy. By the convention between Her Majesty the queen and His Majesty the king of the French, signed at

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London, February 13th, 1843, and which is the only convention in force between England and France for the extradition of criminals, it was "agreed that the high contracting parties shall, on requisition made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes of murder (comprehending the crimes designated in the French Penal Code by the terms assassination, parricide, infanticide, and poisoning), or of any attempt to commit murder, or of forgery, or of fraudulent bankruptcy, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other," &c. It appeared, therefore, that *abus de confiance* was not an offense included in the above convention, and it was alleged in the affidavit of A. L. M. Bouvier "that as a judgment is indivisible (*judicatio est tota in totâ, et tota in quâlibet parte*), the surrendering of me to the French authorities on a judgment, one of the offenses for which such judgment has been given not being comprised in the said Extradition Act, 1870, would be surrendering me to punishment for an offense not contemplated by the said act, and would consequently be in violation of such act."

305] *On the 4th of December, 1865, notice was given by the French government to terminate the above-mentioned convention on the 4th of June, 1866, but it has been continued in force from mutual agreement, and is now declared to be in force till the 1st of September, 1873. On the 28th of March, 1852, a new convention was concluded with France for the surrender of criminals, but it was not sanctioned by parliament, and it has therefore never had any effect.

The order of the police magistrate of the said island of Jersey was as follows:

"Police Correctionnelle.

"Oct. 24, 1872.—Alfred Louis Marie Bouvier, faux et banqueroute frauduleux, envoyé en prison pour être remis aux autorités Françaises après quinze jours.

"G. T. MARETT, St. D."

By 33 & 34 Vict. c. 52, s. 3, sub-sect. 2, a "fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning, to Her Majesty's dominions, be detained or tried in that foreign state for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded." By sect. 4, "an order in council for applying this act in the case of any foreign state shall not be made unless the arrangement. . . .

(*) is in conformity with the provisions of this act, and in particular with the restrictions on the surrender of fugitive criminals contained in this act."

In moving for the rule, it was contended that neither under the treaty or convention, or under the Extradition Act, 1870, was there any power to surrender a fugitive criminal for the offence of *abus de confiance*; that only the crime of fraudulent bankruptcy was mentioned in the warrant; and that by sect. 3, subsect. 2, of the Extradition Act, 1870, there was no power to surrender the criminal, inasmuch as no provision or arrangement had been made as intended by that sub-section.

In showing cause against the rule, the following affidavit was used:

"I, Adolphe Moreau, of No. 5 Chancery-lane, in the county of Middlesex, Esq., make oath and say:

"1. I am the officially appointed counsel to the French embassy in London, and I am well acquainted with the law and constitutions of France, and that part thereof which relates to legal proceedings in matters of extradition.

"2. I say, speaking from such knowledge, that according to the law of France provision is made that a fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in France for any offense committed by him prior to such surrender other than the extradition crime, proved by the facts upon which the surrender is granted; and I say, speaking from my own *knowledge and experience, that this law is ob- [306] served in practice by the French tribunals and authorities.

"3. The general principles and rules of the French law in matters of extradition are comprised in a circular dated 5th April, 1841, containing the special instructions of the minister of justice (*garde des sceaux*) to the law officers of the government. This circular is printed at length in a book entitled "*Monographie Alphabétique de l'Extradition, par Erariste Blondel*," which is now produced and shown to me, marked A, and which is a recognized authority and book of reference in the French courts; and I say, speaking from my own knowledge and actual experience, that the law is correctly laid down in such circular, and is the law followed by the French courts in such matters.

"4. It is a principle of French and of international law that the individual whose extradition has been granted can only be prosecuted and tried for the very crime for which his extradition has been obtained; and I say, speaking from my own knowledge and actual experience, that this is the invariable practice of the French tribunals.

"5. All these principles and rules are to be found laid down

by Monsieur Felix as principles and rules of international law in his '*Traité du Droit International privé*,' vol. 2 of which is now produced and shown to me, marked B, in which he specially refers to the above circular as containing a *résumé* of such principles and rules; and I say, speaking from my knowledge and actual experience, that international law is accepted as binding law by all the French tribunals, and that the said work of Monsieur Felix and the said circular are accepted by all such tribunals as binding authorities, and that the practice of such tribunals in such matters conforms to the law as laid down in the work of Monsieur Felix and the said circular.

The *Attorney-General* (Sir J. D. Coleridge) and Bowen showed cause against the rule. The 6 & 7 Vict. c. 75, which was passed to give effect to the treaty of 1843, referred to in the affidavits, is repealed; the Extradition Act now in operation is the 33 & 34 Vict. c. 52 (The Extradition Act, 1870), and all that is necessary to ascertain in the present case is whether the proceedings which have been taken are authorized by that act. The affidavits show that the machinery provided by it has been followed. By the 22d section "this act (except so far as relates to the execution of warrants in the Channel islands) shall extend to the Channel islands and Isle of Man in the same manner as if they were part of the United Kingdom, and the royal courts of the Channel islands are hereby respectively authorized and required to register this act." The order made by the police magistrate referred to in the affidavits is therefore warranted, as he had the same power as a police magistrate in England would have. Then by sect. 27 it is provided that "the act (with the exception of anything contained in it which is inconsistent with the treaty 307] ties referred to in *the acts so repealed) shall apply (as regards crimes committed either before or after the passing of this act) in the case of the foreign states with which those treaties were made, in the same manner as if an order in council referring to such treaties had been made in pursuance of this act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this act."

The condition imposed by sect. 3, sub-sect. 2, is inconsistent with the treaty. If, therefore, the machinery of the act has been followed, the case is the same as if an order in council had been made. If the condition in sub sect. 2 of sect. 3 is inconsistent with the treaty, it does not apply. The matter is made more clear by the 18th section, which provides that, "if by any law or ordinance made before or after the passing of this act by the legislature of any British possession, provision is made for carrying into effect, within such possession, the surrender of

fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the order in council applying this act, in the case of any foreign state, or by any subsequent order, either suspend the operation, within any such British possession, of this act, or of any part thereof so far as it relates to such foreign state, and so long as such law or ordinance or any part thereof shall have effect in such British possession, with or without modifications and alterations, as if it were part of this act. The intention was to make a general act which should apply to all cases except where there was anything inconsistent with the treaties referred to. The treaty of 1843 is one of such treaties, and there being something in sect. 3, sub-sect. 2, inconsistent with the treaty, the condition so imposed does not apply to that treaty. But, further, the objection which was taken to the proceedings in moving for the rule is answered by the affidavit of Adolphe Moreau. It is clear that Bouvier could not, until he had been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried for the offense of *abus de confiance*, or for any offense committed by him prior to such surrender, other than the extradition crime proved by the facts upon which the surrender is granted. The law of France is not as stated on behalf of Bouvier. This court will be guided by the statement of the law by a person in the position of M. Moreau, as described in his affidavit, the more so as the circular to which he refers is also referred to by an author of such repute as M. Felix: (see the passage referred to at vol. 2, p. 333.) [Stopped by the court.]

G. Broune, in support of the rule. Under sect. 3, sub-sect. 2, the court will order the discharge of the prisoner Bouvier. It is not clear that by the law of France provision is made that he shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried for any offense other than the extradition crime proved by the facts on which the surrender is grounded. M. Moreau is not justified in his declaration of the law of France, which [308 is contrary to that set forth in Bouvier's affidavits, and the cases cited from Dalloz at p. 93 of Clarke upon the Law of Extradition: "The rule that a prisoner surrendered upon a charge of crime, but accused also of misdemeanor, should only be tried for the crime, has been acted upon in the case of Dermenon, who was given up by Geneva in 1840, on a charge of fraudulent bankruptcy. The *renvoi* of the *Chambre de Mises en Accusation* ordered that if acquitted on this charge he should be tried for simple bankruptcy and breach of trust. He was so acquitted, and the minister of justice held himself bound to re-deliver him to Geneva. That state refused to receive him; but the ques-

tion whether this operated as a new extradition, or whether he ought to be liberated at the French frontier, was held to be a purely political matter : (Daloz, Jurisp. Gén. 1840, I., 438). The rule was also recognized in the case of Sauve, a deserter from the French army, accused of theft. He was delivered up by Switzerland on the express condition that he should not be tried as a deserter, but only for the theft, for which he had been condemned *par contumace*. It was held in this case that the judges, empowered according to the information to judge of the misdemeanor as well as the crime, ought to declare themselves without jurisdiction over the former. Sauve was tried and condemned as a deserter, but this judgment was overruled by the Conseil de Révision of Paris, and he was sent back to be allowed to purge his contumacy, and to be tried for the thefts charged against him : (Daloz, Jurisp. Gén. 1862, V. 159). Other cases, however, show that the principle must be taken with some modifications : " In the case of Wolf Cromback, in 1845, the prisoner was delivered up by Switzerland for "*faux en écriture de commerce*." The order of extradition was general, but this was the only description of forgery specified in the treaty under which he was claimed. On his trial the writings proved not to be of a commercial character, and he was convicted of '*faux en écriture privée*.' He thereupon prayed the court that he might be sent back to Switzerland, quoting Dermenon's case ; but this point was overruled, and he was sentenced to five years of '*réclusion*' and to '*l'exposition*.' He appealed to the Cour de Cassation, which, after deliberation in Chambre de Conseil, decided that, as the treaty provided for the delivery up, not only of those declared guilty, but of those pursued as such in virtue of warrants certified by the proper legal authority, the legality of the extradition and of its consequences must be tested, not by reference to the gravity and legal character of the crime as described in the sentence of condemnation, but with regard to the original charge against him upon which he was pursued. The appeal was therefore rejected : (Daloz, Jurisp. Gén., 1845, I., 3.) In the same year the Abbé Grandfaux, charged with '*faux en écriture privée et d'enlèvement de mineure*,' was given up by Tuscany, with an express stipulation that he should not be tried for the latter offense. The Chambre des Mises en Accusation, however, finding there were no sufficient grounds for the heavier charge, remanded him, and instructed the Cour d'Assizes to try him for the smaller offense.

On appeal against this *arrêt*, the Cour de Cassation held that the criminal courts must proceed without regard to the conditions of extradition. That was a matter for the consideration

of the government, which might prevent the execution of the sentence and redeliver the criminal : (Daloz, *Jurisp. Gén.* 1845, I., 405). The other French decisions refer chiefly to the incompetence of the tribunals to consider the legality of the surrender which has been made. The doctrine was fully laid down in the case of Burgerey in 1841. He was given up by the republic of Berne on a charge which did not come within the treaty. He appealed against his conviction, but the Cour de Cassation held that the two countries might have extended or modified the convention by subsequent agreements, according to the requirements and obligations of the friendly relations which subsisted between them ; that the French tribunals were not called upon to inquire into the reasons which had determined the Republic of Berne, the sole guardian of its own independence and dignity, to grant the extradition ; and that, whether it had been demanded or spontaneously accorded, the prisoner had been legally remitted to the jurisdiction of the law by which his crime was punishable : (Daloz, *Jurisp. Gén.* 1841, I., 440)." [BLACKBURN, J., also cited the following from the same book, p., 91 : "Extradition can only be admitted with regard to a person accused of a crime other than the political crime, and not of a misdemeanor. It follows that if the extradition has been obtained of a person accused at once of a crime and a misdemeanor, he ought not to be put upon his trial for the misdemeanor." And again : "The order of extradition states the act upon which it is founded, and that act alone should be investigated." The attorney general pointed out that in this case the warrant of committal and the requisition only mentioned the two extradition crimes—forgery and fraudulent bankruptcy.] At all events, it does not sufficiently appear between such contradictory authorities what the French law is on the subject, and therefore extradition ought not to be granted under the present act.

COCKBURN, C. J. I am of opinion that this rule should be discharged. I rather hesitate to express any decided opinion as to the construction to be put upon the 27th section, although I see plainly what was the intention of the legislature—that is to say, it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force. This has been probably effected, but is certainly not very clearly expressed. Nothing would have been more simple than to enact that, although it was expedient to repeal the statutes, yet that the treaties should still have full force and effect ; instead of which this complicated and obscure language has been adopted. If it were necessary in the present

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310] *case to decide that point, I should have been prepared to do so, and to declare that the object had been accomplished, though at the same time I should be disposed to advise the government to make the matter safe by amending the act, in case any question might hereafter arise upon it. Upon the second ground upon which we are asked to discharge the rule, I think there can be no real doubt. By sect. 3, sub-sect. 2, the statute is to have full force where provision is made by the law of the state demanding the extradition of the criminal, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the foreign state for any offense committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. I consider that the requirements of this provision are satisfied. We are now clearly informed of the practical working of the French law by the affidavit of M. Moreau referring to the circular which is binding upon the courts of that country. It expressly provides that the criminal who is surrendered in respect of one offense will not be tried for another, until he has been restored or has had an opportunity of returning to Her Majesty's dominions. This view of the French law is confirmed by M. Felix, M. Blondel and other authors of the highest possible authority. I am satisfied that we must discharge the rule.

BLACKBURN, J. I have no doubt that it was intended that the old treaties should still have force and effect, and that they should be enforced by the machinery provided under the Extradition Act, 1870. It was not intended to abrogate the old treaties, but I have very serious doubts whether the legislature have effected by the 27th section what was intended. If it was necessary to decide that point, I should desire to take time to consider, but I content myself with saying that it seems desirable that there should be some further legislation upon the subject. But upon the other point I am of opinion that the requirements of sect. 3, sub-sect. 2, are complied with. The French law does provide that the fugitive criminal shall not be tried for an offense committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. When we read the affidavit of M. Moreau and the text books, this is made clear. The criminal ought therefore to be surrendered. *

MELLOR, J. I am inclined to agree with the construction of sect. 27 suggested by the attorney general; but I feel some doubt, and it would be advisable to set all doubt at rest by

further legislation. Upon the other point I entirely agree with the judgments of my lord and my Brother Blackburn.

Rule discharged.

Attorney for the crown, *The Solicitor to the Treasury.*

Attorneys for applicant, *Saunders and Hawksford, for F. Hawksford, Jersey.*

[12 Cox's Criminal Cases, 311.]

***NORTHERN CIRCUIT. MANCHESTER. [311]**

December 5, 1872.

(Before Mr. Justice Lush.)

REG. V. MAYERS.*

Attempt to commit a rape on a woman asleep—Incapability to consent.

If a man has or attempts to have connection with a woman while she is asleep, it is no defense that she did not resist, as she is incapable of resisting. The man can therefore be found guilty of a rape, or of an attempt to commit a rape.

RICHARD MAYERS was indicted for having committed a rape on Sarah Ann Mayers, on the 12th of August, 1872, at Manchester.

Grimshaw was for the prosecution.

Taylor was for the defense.

The prosecutrix was sister-in-law of the prisoner, and they lived in the same house; the offense was alleged to have been committed at about eight o'clock on the morning of the 12th of August last, while she was asleep in her bed; her husband had gone to his work at seven o'clock that morning. She was then awake, but went to sleep again.

The prosecutrix gave the following evidence: "On the 12th of August, at 7 A. M., I got up to get my husband's breakfast, and went to bed again directly afterwards and fell asleep; the first thing after that which I remember was finding the prisoner in bed with me; he was agate[†] of me when I awoke; I said nothing but turned away from him; I cannot say that he did it altogether; his person was to mine; I cannot say he did more, he was only a moment in that position; I got up immediately and went down stairs, and then I went to a neighbor's house and told her about it. Cross-examined: Prisoner has lived in the house two or three years; there has never been any attempt at familiarity before; I could not tell if he was drunk or sober."

* Reported by H. THURLOW, Barrister-at-law.

† Agoing; adoin; Wright's *Provincial Dictionary*.—MOAK.

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312] *The learned judge having said that there was no cause of actual rape, but only of the attempt.

Grimshaw, for the prosecution, assented.

This closed the case for the prosecution, and no witnesses were called for the defense.

Taylor for the prisoner, now contended that there was no evidence of force or intent to use force, or that she resisted the prisoner, and therefore the prisoner could not be found guilty of the attempt.

LUSH, J. Yes; but if she was asleep, she is incapable of consent, and therefore it would be a rape.

Taylor. But there must be evidence that he used force; see *Reg. v. Stanton* (1 Carr. & Kir., 416), in which case the prisoner was indicted for an assault with intent to commit a rape, and Coleridge, J., said there must be some evidence of force; the words of the indictment are "violently and against her will." Here there is no evidence of violence.

LUSH, J. But if she was asleep it is against her will, and I shall rule that if he had, or attempted to have, connection with the woman while she was asleep he is guilty. Whether she was helpless or asleep it is the same.

Taylor then referred to *R. v. Barrow* (11 Cox C. C., 191; 38 L. J., M. C.).

LUSH, J. But in *Barrow's case* she was not quite asleep, she was only half unconscious.

LUSH, J., to the jury: In this case there is no evidence of actual rape. You may, however, find the prisoner guilty of the attempt; for I shall lay down the law to you, that if a man gets into bed with a woman while she is asleep, and he knows she is asleep, and he has connection with her, or attempted to do so while in that state, he is guilty of rape in the one case and the attempt in the other. Therefore, what you must consider is this — did the prisoner come into the prosecutrix's room with the intention of having connection with her while she was asleep? If he did not have connection with her, but only attempted to do so, he is guilty of the attempt only. You must in this case take into consideration the circumstances of the case, for there is no doubt, although he had lived in the same house with her for two years, he had never attempted any familiarities with her before. Can you think, therefore, that he intended to have connection with her while she was awake? The question, therefore, for you is, did he get into that bed intending to have connection with her while she was asleep? If he did have connection with her while she was asleep he is guilty of rape; if he only attempted to do so he is guilty of the attempt. *Gulity*.

[12 Cox's Criminal Cases, 313.]

December 7, 1872.

*NORTHERN CIRCUIT. MANCHESTER. [313]

(Before Mr. Justice Lush.)

REG. V. TURNER. *

Personation—Ballot Act, 35 & 36 Vict. c. 39 s. 24—Municipal election—Evidence 5 & 6 Will. 4 c. 76, s. 43.

It is not necessary to produce the charter of a city to prove that it is a municipal corporation; production of the minutes of the council at which the alderman was chosen for the ward is sufficient evidence, if it proves that the councillors of the ward were present on the occasion, and it is a sufficient compliance with sect. 43 of 5 & 6 Will. 4, c. 76.

DAVID TURNER was indicted for having willfully, falsely, and feloniously applied for a ballot paper at the municipal election for the City of Manchester of the 1st of November.

Hopwood was for the prosecution.

Leresche was for the defense.

The prisoner was indicted under the 24th section of 35 & 36 Vict. c. 33 (the Ballot Act), which enacts that "a person shall for all purposes of the laws relating to parliamentary and municipal elections be deemed to be guilty of the offense of personation who, at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person; or who, having voted once at any such election, applies at the same election for a ballot paper in his own name.

"The offense of personation, or of aiding, abetting, counselling, or procuring the commission of the offense of personation, shall be a felony; and any person convicted thereof shall be punished by imprisonment for a term not exceeding two years with hard labor."

The indictment was as follows:

Lancashire,	}	The jurors of our lady the queen upon their to wit.
The jurors present, that heretofore, and at the time of the committing of the felony hereinafter mentioned, the city of Manchester, in the said county aforesaid, was a municipal *borough, city and corporation, within the meaning [314 of the acts of parliament relating to municipal cities, boroughs and corporations, and to municipal elections, and had been, and was duly divided for election and other purposes, into wards, to wit, fifteen named, called, and known as New Cross ward,		

* Reported by H. Thurlow, Esq., Barrister-at-law.

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Reg. v. Turner.

St. Michael's ward, Collegiate Church ward, St. Clement's ward, Exchange ward, Oxford ward, St. James's ward, St. John's ward, St. Ann's ward, All Saints' ward, St. Luke's ward, St. George's ward, Medlock-street ward, Ardwick ward, and Cheetham ward. And the jurors aforesaid, upon their oath aforesaid, do further present, that during all the time first aforesaid, at the city aforesaid, to wit, on the 1st day of November, 1872, a municipal election within the meaning of the Ballot Act, 1872, was proceeding and being held in due form of law, to wit, the election of a person to serve the office of councillor for the ward of St. Clement's aforesaid, whereunto one George Anderson and one Edmund Asquith had been before then duly nominated, and were candidates, and the same was during all the time being held and proceeding at divers polling booths and stations, and among others at a polling booth and station numbered 5, before one John Nelson then and there acting as presiding officer at the said polling booth station, and during all the time aforesaid, the name of Henry Stocks appeared and was in and upon the register of voters, that is to say, the burgess and citizens roll of the said city and the ward, and the list of the said ward then in force, as a citizen having a right to vote at the said election; and thereupon at the city aforesaid, on the day and year aforesaid, at the municipal election aforesaid, David Turner willfully, falsely, and feloniously did apply for a ballot paper at the said polling booth and station numbered 5, before the said John Nelson, in the name of some other person than himself, of the said David Turner, that is to say, in the name of the said Henry Stocks, against the form of the statute in such case made and provided, against the peace of our lady the queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing of the felony hereinafter set forth, the city of Manchester, in the county aforesaid, was a municipal borough within the meaning of the acts of parliament relating to municipal corporations, and a municipal election of a person to serve the office of councillor for a ward of the said city, that is to say, St. Clement's ward, was being held, and thereupon David Turner, late of the city aforesaid, on the 1st day of November, 1872, at the city aforesaid, at and during the said municipal elections in and for the said St. Clement's ward aforesaid, for a ballot paper in the name of a person other than himself, to wit, in the name of one Henry Stocks, then and there feloniously did apply, against the form of the said statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

The circumstances of the case were as follows: The municipal

*election for the city of Manchester took place on the 1st of [315 November and the prisoner went on that day to one of the polling booths for St. Clement's ward, and, after having stated that his name was Henry Stocks, of under 52, Boardman street, applied for a ballot paper, which was given him, and which he placed in the ballot box. For the prosecution the following witnesses were called :

John Nelson said he was presiding officer at No. 5 polling booth in St. Clement's ward on the first of November, at the election for that ward. He saw prisoner come into the booth, and heard him say he was Henry Stocks, of under 52, Boardman street. A voting paper was handed to him.

Samuel Gill said he was agent to Mr. Asquith, who was a candidate at the municipal election for the first of November. He was at No. 5 polling booth in St. Clement's ward, and heard prisoner say he was Henry Stocks.

Ellen Stocks said she was the wife of Henry Stocks, and that on the 1st of November her husband was away in Staffordshire.

Sir Joseph Heron said he was the town clerk of Manchester, and he produced the burgess roll in which Henry Stocks appeared as occupier of 52, Boardman street.

This was the case for the prosecution.

Leresche, for the prisoner, contended that it must be proved that Manchester was a municipal corporation; that there had been no proof of this; and that the charter of the city ought to have been produced.

LUSH, J., overruled the objection, as he said that it was in his judicial knowledge that Manchester was a municipal corporation.

Leresche then objected that under sect. 43 of 5 & 6 Will. 4, c. 76, it should have been proved that the election should have been held before the alderman whom the councillors chosen in such ward shall yearly appoint in that behalf. In this case it appeared that the alderman in question had been chosen by the council of the city, and not by the councillors.

In answer to this the town clerk produced the minutes of the council at which the choice of the alderman for the wards respectively was made, and that at that meeting the proper number of councillors for the ward in question were present.

Hopwood contended that the proof of the acting of the alderman as presiding officer was sufficient proof of due appointment, and cited *R. v. Thompson*, 2 Moo. & R., 355, and that the production of the minutes was sufficient proof of the appointment.

LUSH, J., after having consulted MELLOR, J., who was sitting

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in the other court, said that as it appeared by the minutes that the councillors of the ward were present on the occasion of the choice of the alderman, and that was a sufficient compliance with the requirements of sect. 43 of 5 & 6 Will. 4, c. 76.

Guilty. Sentence twelve months' hard labor.

[12 Cox's Criminal Cases 316.]

December 16, 1873.

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*CENTRAL CRIMINAL COURT.

(Before Mr. Justice Brett.)

REG. V. BUNN, RAY, JONES, WILSON, and DILLEY.*

Conspiracy—Trades Union Act 34 & 35 Vict. c. 31; Criminal Law Amendment Act (34 & 35 Vict. c. 32).

An indictment for conspiracy at common law will lie against two or more persons for conspiring to commit an offense for which special provision is made by statute.

The defendants, servants of a gas company under contract of service, being offended by the dismissal of a fellow servant, agreed together to quit the service of their employers, without notice and in breach of their contracts of service, by reason of which the company were seriously impeded in the conduct of their business.

Being indicted for a conspiracy, it was contended that the stat. 34 & 35 Vict. c. 31, having determined that no act shall be illegal merely by reason of its being in restraint of trade, and having also defined the offense of "obstructing or molesting," and otherwise determined what shall be deemed to be offenses as between masters and servants, had virtually declared all other acts not to be punishable.

But, held, that the prisoners of the statute had not affected the common law of conspiracy, for which an indictment would lie.

The questions submitted to the jury were as follows:

1st. Did the defendants agree together to force the company against its will to employ a man it objected to employ?

2d. If so, was this sought to be done by improper threats or molestations?

3d. Molestation being anything done with improper intent, to the unjustifiable annoyance and interference with the master in the conduct of his business, and such as would be likely to have a deterring effect on a man of ordinary nerve,—was a quitting of the employ without notice, and breaking of the contract of service, to the undoubtedly serious injury of the master, a molestation within the above meaning of the term?

137] *4. Did the defendants agree together to force their employer to do what they desired by such a molestation?

5. Did the defendants endeavor to enforce their object by simultaneously breaking their contracts of service?

A conspiracy may be to do an unlawful act, or to do a lawful act by unlawful means. If the jury deemed the object lawful, they would further say if the means employed were lawful or unlawful.

JOHN BUNN, George Ray, Edward Jones, Robert Wilson, and Thomas Dilley were indicted for a common law conspiracy

* Reported by EDWD. T. E. BESLEY, Barrister-at-Law.

against their masters, the Gaslight and Coke Company. The charge was variously stated in ten counts. The 1st, 2d, 3d, 4th, 5th, and 10th counts were as follows :

Central Criminal Court } The jurors for our lady the queen,
to wit. } upon their oath present, that heretofore and at the time of committing the offense hereinafter charged, a certain public company called the Gas Light and Coke Company, carried on, used, and exercised the trade and business of manufacturers and vendors of gas, hiring and employing divers servants, workmen, and laborers, in their said trade and business, at wages mutually agreed upon between them the Gas Light and Coke Company and the said workmen and laborers, and that the said Gas Light and Coke Company had so hired and employed one Thomas Dilley, as such servant, and had lawfully, and for good and sufficient cause and reason, discharged the said Thomas Dilley from the service of the said company. And the jurors aforesaid, upon their oath aforesaid, do further present that John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, and the said Thomas Dilley, and divers other persons whose names to the jurors aforesaid are unknown, well knowing the premises, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving, and intending to injure, prejudice, and annoy the said company, and to force and endeavor to force the said company to make alterations in their mode of conducting and carrying on their said trade and business on the 2d day of December, in the year of our Lord, 1872, at the parish of Woolwich, in the county of Kent, and within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate, and agree together amongst themselves, by divers unlawful ways, contrivances, and stratagems and by divers threats and menaces, and other unlawful and wicked means and devices to obtain, extort, and procure of and from one George Careless Trewby, then being the superintendent of the Beckton works of the said Gas Light and Coke Company, and then being lawfully authorized to appoint and discharge the servants and workmen of the said company, the promise of him the said George Careless Trewby, contrary to his own free will to take back and reinstate in the service of the said company the said Thomas Dilley, to the great damage and injury *of the said company, to the evil example of [318 all others in the like case offending, and against the peace of our said lady the queen, her crown and dignity.

Second Count. And the jurors aforesaid upon their oath aforesaid, do further present that the said John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James

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Clark, and Thomas Dilley, and divers other persons, whose names are unknown to the jurors aforesaid, well knowing the premises in the first count mentioned, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving, and intending to injure, prejudice, and annoy the said Gas Light and Coke Company, and to force and endeavor to force the said company to make alterations in their mode of conducting and carrying on their said trade and business, afterwards, to wit, on the day and in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate, and agree together amongst themselves, by divers unlawful ways, contrivances, and stratagems, and by divers threats and menaces, and other unlawful and wicked means and devices, to obtain, procure, and compel the said company, contrary to their own free will and judgment, to reinstate the said Thomas Dilley, in the service of the said company, to the great injury, prejudice, and damage of the said Gas Light and Coke Company, to the evil example of all others in like case offending, and against the peace of our said lady the queen, her crown and dignity.

Third Count. And the jurors aforesaid, upon their oath aforesaid, do further present that before and at the time of committing the offence hereinafter in this count mentioned, the said Gas Light and Coke Company carried on, used, and exercised, the trade and business of manufacturers and vendors of gas, and had hired and employed divers, to wit, five hundred servants, workmen, and laborers, to assist them in the said manufacture, at wages mutually agreed upon between the said Gas Light and Coke Company and the said servants, workmen, and laborers, under and by virtue of certain lawful contracts made between the said Gas Light and Coke Company and the said servants, workmen, and laborers, in that behalf, and had hired and employed the said John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, William Lenz, Edward Penn, Hermann Gers, John Sieper, and divers other servants, workmen, and laborers under the said contracts, and the said servants, workmen, and laborers had severally in and by the said contracts agreed not to leave the service of the said company without due notice of their intention so to do; and the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the said contracts were subsisting and in full legal force and effect; to wit, on the day and in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, the said John Bunn, George Ray, Edward Jones

*Robert Wilson, Samuel Webb, James Clark, Thomas [319 Dilley, and divers other persons whose names to the jurors aforesaid are unknown, well knowing the premises, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving and intending to injure, prejudice, and annoy the said company, and to hinder and prevent the said company from carrying on, using and exercising their said trade and business, unlawfully did conspire, combine, confederate, and agree together amongst themselves, by divers unlawful ways, contrivances, and stratagems, unlawfully to break the said contracts respectively; and that they, the said John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, William Lenz, Edward Penn, Herman Gers, John Sieper, and the said other, servants, workmen, and laborers should depart from their said hiring and service, and that the said last-mentioned persons respectively should not give respectively to the said company any notice in pursuance of the said contracts respectively of their intention so to depart from their said hiring and employment, to the great damage and injury of the said company, to the evil example of all others in the like case offending, and against the peace of our said lady the queen, her crown, and dignity.

Fourth Count. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and at the time of committing the offence hereinafter charged divers public companies carried on, used and exercised the trade and business of manufacturers and vendors of gas, hiring and employing divers workmen and laborers in their said trade and business, at wages mutually agreed upon between them, the said companies, and the said workmen and laborers. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, before and at the time of committing the offense next hereinafter charged, divers public companies, to wit, the Gas Light and Coke Company, the Imperial Gas Company, the Independent Gas Company, the Commercial Gas Company, the Surrey Consumers' Gas Company, the Phoenix Gas Company, and divers other public companies carried on, used and exercised the said trade and business of manufacturers and vendors of gas as aforesaid, in divers parishes and places within the jurisdiction of the said Central Criminal Court; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, Thomas Dilley, and divers other persons whose names are unknown to the jurors aforesaid, well knowing the premises, and being evil disposed persons and unlawfully, wickedly, and unjustly devising, contriving, and intending to

impoverish the said several public companies in this count mentioned and divers other public companies, manufacturers and vendors of gas, and each of them respectively on the day and in the year aforesaid, within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate 320] and agree together amongst themselves *by divers unlawful ways, contrivances and stratagems, and by divers unlawful and wicked means and devices, to impoverish in their said trade and business of manufacturers and vendors of gas the said Gas Light and Coke Company, the said Imperial Gas Company, the said Independent Gas Company, the said Commercial Gas Company, the said Surrey Consumers' Gas Company, and the said Phoenix Gas Company, and divers other companies respectively then and there carrying on, using and exercising the said trade and business of manufacturers and vendors of gas as aforesaid, to the great damage of the said Gas Light and Coke Company, the said Imperial Gas Company, the said Independent Gas Company, the said Commercial Gas Company, the said Surrey Consumers' Gas Company, and the said Phoenix Gas Company, to the evil example of all others in the like case offending, and against the peace of our said lady the queen her crown and dignity.

Fifth Count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, Thomas Dilley, and divers other persons whose names are unknown to the jurors aforesaid, well knowing the premises in the fourth count mentioned, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving, and intending to hinder and prevent the said public companies in the fourth count mentioned, and each of them respectively, from carrying on, using, and exercising their said trade and business of manufacturers and vendors of gas on the day and in the year aforesaid, within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate, and agree together amongst themselves by divers unlawful ways, contrivances, and stratagems, and by divers unlawful and wicked means and devices, to prevent and hinder them, the said Gas Light and Coke Company, the said Imperial Gas Company, the said Independent Gas Company, the said Commercial Gas Company, the said Surrey Consumer's Gas Company, the said Phoenix Gas Company, and each of them respectively, from carrying on, using, and exercising their said trade and business so carried on, used, and exercised as aforesaid, to the great damage of the said Gas Light and Coke Company, the said Imperial Gas Company, the said Independent Gas Company, the

said Commercial Gas Company, the said Surrey Consumer's Gas Company, and the said Phoenix Gas Company, to the evil example of all others in the like case offending, and against the peace of our said lady the queen, her crown and dignity.

Tenth Count. And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing the offense hereinafter in this count mentioned, the said Gas Light and Coke Company were possessed of certain buildings, gas holders, retorts, machinery, appliances, and materials, for manufacturing gas at Beckton, in the county of Kent, and within *the jurisdiction of the said Central Criminal [321 Court, and were under certain acts of parliament legally bound to supply gas for the lighting of the public lamps in certain districts and places in the said acts of parliament mentioned, and were also in like manner bound to supply all the liege subjects of our said lady the queen with gas, within the said districts at all hours of the day and night. And the jurors aforesaid, upon their oaths aforesaid, do further present, that for the purpose of keeping up a constant and continuous supply of gas to the said public lamps, and to the said liege subjects of our said lady the queen it was necessary to employ a large number of servants, workmen, and laborers, to wit, five hundred servants, workmen, and laborers, to carry on continuously and without interruption the manufacture of the said gas, at the said works at Beckton, and that the work and labor of manufacturing gas was so continuously and without interruption carried on by means of about half of the number of the said servants, workmen, and laborers working in the said works by night, and about half of the number of the said servants, workmen, and laborers working in the said works by day. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said servants, workmen, and laborers were hired by the said company, and the said servants, workmen, and laborers entered the service of the said company upon an agreement and contract of service, that the said service should not be determined by the said company or by the said servants, workmen, and laborers respectively, without a previous notice of their intencion respectively, so to determine the said service; the object of the said agreement and contract of service being that there should be no interruption in the carrying on the said manufacture of gas at the said works, by reason of any of the said servants, workmen, and laborers suddenly ceasing to perform their part of the said work and labor. And the jurors aforesaid, upon their oath aforesaid, do further present, that previous to the 2d day of December, A.D., 1872, the said continuous manufacture of gas had been and was being carried on at the said works

as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that on the said 2d day of December, A.D. 1872, at Beckton aforesaid, and within the jurisdiction of the said Central Criminal Court, John Bunn, George Ray, Edward Jones, Robert Wilson, James Clark, and Thomas Dilley, well knowing the premises, and being servants, workmen, and laborers as aforesaid, under contracts of service as aforesaid, and which said contracts of service with the said company as aforesaid had not been determined by previous notice as aforesaid, willfully, designedly, and unlawfully did conspire, combine, confederate, and agree together, and with divers others whose names are to the jurors unknown, themselves to commit a breach of the said contract of service, and by divers threatening notices, exhortations, persuasions, falsehoods, stratagems and devices to procure, induce, and constrain the other servants, 322] workmen, and *laborers, whether working on the said works by night or by day, against their own free will and good judgment also to commit a breach of the said contract of service at one and the same time; that is to say, to refuse to do the necessary work and labor required to be done as aforesaid, for the purpose of manufacturing and supplying gas without interruption as aforesaid, and to leave the said works of the said company, suddenly, simultaneously, and without notice, to the great injury of the said company, and of the said liege subjects of our lady the queen, and of the said servants, workmen, and laborers of the said company, who were otherwise ready and willing to continue their said contract of service, and against the peace of our said lady the queen, her crown and dignity.

The sixth, seventh, eighth, and ninth counts were for molesting, intimidating, and forcing William Lenz and others to leave the service of the gas company, and were given up by the prosecution upon the suggestion of the learned judge in the course of the trial.

Hardinge Giffard Q.C., and *Besley* (instructed by *Humphreys* and *Morgan*) for the prosecution.

Straight and *Humphreys* for Bunn and Dilley; *Montague Williams* for Ray, Jones, and Wilson (instructed by *Shaen*, *Roscoe*, and *Mussey*).

Giffard, in opening the case, cited *R. v. Druitt, Lawrence, Adamson, and others* (10 Cox C. C., 600), and read the words of Bramwell, B., there reported: "When the law gave, or rather acknowledged, a right, it provided a punishment or a remedy for the violation of that right. That was a cardinal rule, and an obvious one. The old expression that 'there was no wrong without a remedy,' might also be interpreted to mean that there

was also no right without a remedy. Sometimes the remedy was by a criminal proceeding, sometimes by a civil action, sometimes by both. Having made those general remarks, he would make another, which was also familiar to all Englishmen — namely, that there was no right in this country under our laws so sacred as the right of personal liberty. No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty. They were quite aware of the pains taken by the common law, by the writ, as it was called, of *habeas corpus*, and supplemented by statute, to secure to every man his personal freedom — that he should not be put in prison without lawful cause, and that if he was, he should be brought before a competent magistrate within a given time and be set at liberty or undergo punishment. But that liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body. Generally speaking, the way in which people had endeavored to control the operation of *the minds of [323 men was by putting restraints on their bodies, and therefore we had not so many instances in which the liberty of the mind was vindicated as was that of the body. Still, if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offense, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves." He also cited *R. v. Duffield* (5 Cox C. C., 406), and read the words of Erle, C. J.: "The indictment charges in one class of the counts, and that to which I think your attention should be most prominently directed, that they conspire to obstruct Mr. Perry in the carrying out of his business, by persuading and inducing workmen, that had been hired by him, to leave his service in order to force him to change the mode of carrying on his business. There are no threats or intimidations supposed to have been used towards the workmen, but there is a class of counts founded upon that, and I take it to be perfectly clear in point of law, and I lay it down to you for the purpose of your verdict, that if that class of counts is made out you will find the defendants guilty upon that class of counts, that they conspired to obstruct Mr. Perry by persuading his workmen to leave him."

The following is an epitome of the evidence then given for the crown.

George Careless Trewby (examined by Besley), said: I am

the superintendent of the Gas Light and Coke company at Beckton Station. It is our largest place for the manufacture of gas. We supply the whole of the city with gas, and part of the West-end. The storage of gas at Beckton is limited. It is therefore necessary the manufacture should go on night and day. For that purpose we employ about five hundred workmen and divide them into two gangs. They are employed in the retort houses where the fires are attended to. The night gang go to work about six o'clock in the evening and work till half-past five the following morning. They are at actual work about five hours. The day gang go on some at six, some at half-past and others at seven, for the different processes. With some of the work people I had written and signed contracts. Those that had not contracts were under an engagement for a week's notice. An advertisement was posted up to that effect at the pay office. A matter was reported to me about the 22d of November with respect to Dilley. He was then a servant. I gave direction for his discharge. I heard nothing further until the 2d of December. Collier, a foreman on the works, came to me. It was a quarter to seven in the morning. In consequence of what he told me I went to one of the retort houses. I there saw the night and day gangs. In the ordinary course of things the night gang should have left at six o'clock. Before the men commence work they change their clothes. None of the day gang had changed their clothes. When I got there I asked the men what they wanted to see me 324] *about. I noticed Jones and Wilson, two of the defendants, standing close to me. I also noticed Webb. The men said they wanted to see me about Dilley's case. Webb was the first spokesman; and I called for the day gang because it was their duty to have gone to work. Jones said they were all there. I said, "why don't you go to your work?" He said, "We have decided not to go until Dilley is reinstated." Wilson spoke to the same effect. Webb spoke also in the same strain. As he belonged to the night gang he should have left the works. I then said, "It is past the time the whole of you should have gone to your work; the company have always behaved liberally towards you; they have conceded all you have asked from time to time. I call on all those who are well disposed to them to go to their work." Not a man separated from the rest. I said both to Jones and Wilson, "Am I to understand that you refuse to go on with your work until Dilley is reinstated?" They said, "Yes." They said "Dilley's and the Fulham question had been put into one. I said, "I had nothing to do with affairs at Fulham;" and I then left them.

By BRETT, J. I spoke loud enough for all the men to hear. They did not move.

Examination continued. I said I should leave them for a short time for consideration. I remained away ten minutes. I then went back. There was something said about the men acting under their delegates. I asked for Bunn and Ray. I said to them, "Am I to understand that you refuse to go on with your work until Dilley is reinstated?" They said, "Yes." I said, "You are acting illegally; some are under a monthly and some under a weekly agreement, and you can't leave without giving proper notice." I said, "I will give you ten minutes more to consider." Jones said, "We have made up our minds." I then went away and returned in about ten minutes. They then said they were of the same opinion.

By BRETT, J. Jones, Bunn, and Ray were there, I won't be sure as to Wilson; Webb was there also. Jones said the men were of the same opinion. I said, "very well, then; I will reinstate Dilley, but I do so under protest; now go on with your work." Webb said, "They don't understand what you mean by protest." I said, "Do you." He said, "Yes." I said, "perhaps you will explain it to them." He said, "The governor means to punish you." He said, "Will you withdraw that word." I said, "How can I? You insist on Dilley's being reinstated, and I reinstate him, but under protest." Webb said, "we may as well tell you we can't go on with our work until the men at Fulham are let in." I said, "That is a matter with which I have nothing to do." The men said, "They could not go to work until they had received orders from their delegate meeting;" that was said by Webb. The night and day hands walked off in a body. I saw Dilley there at the time. These four men belonged to the day gang. Dilley had been discharged. I noticed a placard on the lobby door. Some of the men would have to go there to change their [325] clothes. We have four lobbies. This was where the meeting took place with the men.

Besley. We propose to read the placard.

M. Williams objected. There is nothing to show that these men ever saw it or that they could read or write.

Examination continued. I signed on behalf of the company, these four agreements (produced) I find the signatures of three of the defendants there, Bunn, Ray, and Jones.

Williams. It does not bring it any closer.

BRETT, J. It gets rid of the one point — if a man can write, he can also read.

Williams. I submit there is still the other point.

BRETT, J. Have you any objection?

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Straight. The only objection is, that knowledge must be brought home to the defendants if they are to be criminally responsible.

Giffard. I submit it is evidence; it was a direction to the men to do something.

BRETT, J. That is assuming what is in it. How do you charge these men? Is it a charge of conspiracy between these men and others to the jurors unknown?

Giffard. Yes. It does not require that the particular thing should have been done by any one of these men.

BRETT, J. What do you say, Mr. Straight, to the rule that in indictments for conspiracy, if evidence is given of a conspiracy affecting the defendants, then everything done by any party to that conspiracy is evidence against them.

Straight. But there must be evidence to show that the act was done by some party to the conspiracy.

BRETT, J. Is there not that evidence? Is there no evidence to show this was put up by some of the gang of workman?

Straight. I should venture to say there is no evidence.

BRETT, J. Who else could have put it up?

Straight. That I am not called on to answer.

BRETT, J. If you can't suggest anyone else, it is obvious it must be some of them.

Straight. It may be a stranger put them up.

BRETT, J. That is an answer to the evidence, but is it not more probable that the workpeople were all acting together. I admit the evidence on the grounds I have stated, namely, that there is evidence of a conspiracy.

The notice was put in and read, and was as follows:

"Notice. All men that belong to the Society of Beekton station, working to-night, are bound to answer to their names at six o'clock, a.m., this morning, December, 2d, 1872; by order of the general council. Those absenting themselves after this notice must abide by the consequences."

Examination continued. That was no notice of mine. My attention was drawn to it that morning.

326] **Cross-examination.* This is a monthly agreement (agreement handed in and read as follows):

BECTON STATION.

AN AGREEMENT made this 14th day of November, 1871, between (stoker), of the one part, and The Gas Light and Coke Company, by G. C. Trewby, their agent, of the other part, as follows.

The said company agree to take the said into their employment, at his request, upon the following terms and conditions:

1. The said shall continue in the service of the company for one calendar month, to be reckoned from the day of the date hereof, and after the expiration thereof for such further period until the service shall be put an end to by either

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of the parties hereto giving to the other one calendar month's previous notice in writing of such their intention.

2. The said shall observe and conform to all the rules and regulations of the company, which from time to time are posted on the premises of the company for the information of the persons in their employ.

3. The said shall faithfully work for and serve the company to the best of his skill and power wherever his services be required, and in whichever of the following classes or capacities the company may from time to time require, and at the rate of pay or wages specified for each class and description of work at the foot hereof, or such other piece work as shall be from time to time mutually agreed on.

4. If the said shall leave his employment, or absent himself from his work, without giving the aforesaid previous notice, all pay which may then be due to him shall be absolutely forfeited to the company.

5. The company shall be at liberty to discharge him at any time without previous notice; but in that case (unless in the cases after mentioned) he shall be entitled to one month's pay, at the same rate as shall have been paid to him immediately previous to such discharge; but if his discharge shall be on account of drunkenness, neglect of work, or other misconduct, he shall not be entitled to receive more than the amount of wages which may be due to him up to the time of his dismissal.

6. It is lastly mutually declared that nothing herein contained shall be construed to exempt the said from being liable to the laws now or hereafter in force for the regulations of masters and servants.

As witness the hands of the said parties

G. C. TREWBY.

Witness, W. COLLIER.

1ST CLASS STOKERS.	2D CLASS STOKERS.	3D CLASS STOKERS.	COKE SPREADERS.	LABORERS.
Per Week of 7 Days 36s. 6d.	Per Week of 7 Days 36s.	Per Week of 7 Days 34s.	Per Week of 7 Days 28s.	Per Day 3s. 6d.

PIECE WORK.

Filling Common Coal into Buckets from Ship, per Ton 2½d.	Filling Cannel Coal into Buckets from Ship, per Ton 4d.		Loading Coke into Wagons or Carts, per Chaldron 6d.	Unloading Lime from Barge into Trucks, per Yard 5d.
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The men had to discharge the duties included in that agreement. These agreements have been in use since 1871. In 1871, Bunn was employed in the retort house. He would be a stoker. Laborers would be liable to stoker work if they could do it. It was the practice at the works to a certain extent. Dilley was in the service about eighteen months. All that I have told you about took place on the 2d of December. The whole affair took about three-quarters of an hour. There were no threats used. I reinstated Dilley because I was anxious to *get the work done. Dilley was what is called a pipe [327] jumper. It is included in the third class pay. He would have been liable for other work. Pipe jumping is keeping the ascension pipe from the retorts clear. The rates of wages have been altered since the agreement. Dilley would work day or night,

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according to the gang in which he was. The men are paid on the increased rate.

BRETT, J. I trust these questions are material.

Straight. I am putting these questions because, so far as I can gather from the indictment, they allege there were contracts between the men at the bar and the gas company, which would bring them under the terms of the Master and Servant Act, and what I am going to submit to you is that these persons do not come within the terms of that act of parliament.

Cross-examination continued. A person who had signed these agreements was never dismissed for the day. I am aware Dilley left his employment on the 31st of November. The men wear different clothes at their work. They left them at the works in their lockers. Each man has a locker.

Cross-examination by Mr. Williams. Ray, I believe, was a pipe jumper; Jones was a second class; Wilson, he was either first or second class. It appears Wilson cannot write.

BRETT, J. Wilson's agreement is signed with a mark.

Williams. Yes, my lord.

Cross-examination continued. These agreements were read to the men by Collier, the foreman. When I first went to the men about five hundred were assembled. I addressed them as a body. I heard no bad language or threats.

William Collier said. I am foreman to the carbonizing department of the Beckton Gas Works. I was witness to the signature of those four men. Wilson is a marksman.

Cross-examined. The men had the opportunity of reading the agreements over. I cannot say the agreement was read over to these individual men.

Samuel Leonard. I was foreman of stokers. On the morning of December 2d, when I got to the works, I found a great number of men there. They were standing by the retort house. In consequence of some observations, I went and fetched Mr. Trewby, the manager. On the 22d of November I ordered Dilley to do some work. He refused to do it. He said, "It is against the rules of my society."

Cross-examined. I have known Dilley since he has been in the service. He always before discharged his duty properly. He was a hard working man. He had left on the 2d December. He had been doing different work, not always the same. Bunn was under my control. Dilley told me he came from the Imperial Gas Company at Battle Bridge. Bunn was a good workman.

Thomas Taylor. I was in the service of the gas company. I was a member of the Amalgamated Gas Stokers' Society. Dilley 328] *represents the place where he is employed at that So-

ciety. Jones was also a delegate. Wilson was substituted in his place in consequence of some discussion between the men. I struck with the rest of the men. Until I got there that morning I had no intention of striking.

Cross-examined. I was cross-examined before the magistrates. The society of which I speak has been in existence some four or five months.

Re-examined. When we left the works we went to a public house in the Barking road. We expected to be sent for by Mr. Trewby to go to work again.

To Straight. Bunn was not a delegate. Dilley had been one, but I can't say whether he was after his discharge.

To BRETT, J. The delegates are elected by the workmen at the works. They attend the meetings of the society.

Thomas Roffey. I was employed at the gas works, and was a member of the Amalgamated Gas Stokers' Society. I was compelled to be a member by the workmen. On the 2d of December, when I was at work, I saw the defendants there. Dilley told me if I did not go with the men I should be spotted. I had no intention of leaving the works. I went with the mob to Barking. I heard something said about telegrams there. The telegram was to come from London.

Edward Penn. I was in the employ of the gas company at Beckton. I went as usual to my work on the 2d of December. I saw Dilley there. I told him I was going to work. He told me to put my clothes on, or else put up with the consequences.

Cross-examined. I was examined at Woolwich before a magistrate.

Frederick Byes. I am a gas-stoker. I went to work on the 2d of December. I saw Bunn there. He said there was no work to-day. I went to Barking. I saw Jones and Ray there. I had no idea of any strike until I got to the works.

Cross-examined. I am a member of the union.

William Lenz. I am a German, and was working at Beckton Gas Works. I was on the day gang. I was told by Dilley to go to the meeting with the others. I said that is nothing to do with me. Dilley said, "Bloody German."

John Sieper. I was in the employ of the gas company. On the morning of the 2d of December I went to my work. I was told to go to the meeting. I was frightened to go to work.

Cross-examined. I was a stoker. All that Dilley said to me was, "Go to the meeting."

Frederick Alexander McMeun. I am a sub-engineer to the Imperial Gaslight and Coke Company at their station at Fulham. On the 28th of November there was a man discharged, in consequence of which there was a strike.

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Straight directed his lordship's attention, first, to the form of the indictment, and, secondly, whether there was sufficient evidence *to bring the defendants or any of them within the terms of any of its ten counts, in which the offenses charged were more or less varied. It must be assumed that a combination between workmen for the purpose of raising their wages was, both before, and at the time of, the passing of the Master and Servants Act, in 1867, perfectly legal, that act only extending the operation of a variety of statutes, commencing with the 20 Geo. 2, c. 119 — all these earlier acts rendered certain persons therein specified capable of entering into contracts to which certain penalties and liabilities were attached, and which obligations were not incidental to the ordinary contract of hiring between master and servant.

The relation between masters and servants, prior to the act of 1871, the Trades Union Act, and the Criminal Law Amendment Act, has never yet been defined by statute. The present indictment, which is one at common law, charges in its first two counts a combination and conspiracy on the part of the several defendants, with an intent on their part to injure, annoy, and prejudice, and to force and endeavor to force the Gas Company to make alterations in their mode of conducting and carrying on their trade and business by divers unlawful ways, contrivances, and stratagems, and by divers threats and menaces to obtain, extort, and procure from George Trewby a promise contrary to his (Trewby's) own free will, that he would restore Dilley. Since, however, the well known case of the tailors tried by Mr. Baron Bramwell (*Reg. v. Druitt and others*, 10 Cox C. C., 600), where existing law was correctly expounded, viz., in 1871, which may be almost said to go together, the Trades Union Act, and the Criminal Law Amendment Act, have been passed, by which the legislature, having regard to the relations subsisting between masters and men, has created certain criminal offenses. This would seem to abrogate any common law right to create offenses which may, and probably must, at the time these statutes were passed, have been in the contemplation of the legislature. The 34 & 35 Vict. c. 31, s. 2, says, "The purposes of any Trade Union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such Trade Union liable to a criminal prosecution for conspiracy or otherwise." And sect. 3 says, "The purposes of any Trade Union shall not by reason merely that they are in restraint of trade be unlawful, so as to render void or voidable any agreement or trust." The Act of Parliament was passed mainly in consequence of the case of *Farrar v. Close*, in the Queen's Bench, where the judges differed, the

lord chief justice and Mr. Justice Mellor holding one view, and Mr. Justice Hannen and Mr. Justice Hayes an opposite one, and on account of complaints made that Trades Unions legitimately formed for the legitimate purpose of promoting the fair interests of their trade, were not capable of prosecuting persons who embezzled their funds. By that act, the old doctrine that combinations between workmen in restraint of trade were illegal, *was abolished, and it was enacted that Trades Unions [330 and societies of workmen for the purpose of doing something that might restrain trade might be formed without being illegal. The definition in the Trades Union Act, of what was to be a Trade Union is as follows: "The term Trade Union means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workman and workman, or between masters and masters; or for imposing restrictive conditions upon the conduct of any trade or business as would, if this act had not passed, have been deemed to have been an unlawful combination by reason of any one or more of those purposes being in restraint of trade, provided that this act shall not affect "1. Any agreement between partners as to their own business; 2. Any agreement between an employer and those employed by him as to such employment; 3. Any agreement in consideration of the sale of the good will of a business, or of instruction in any profession, trade, or handicraft." Therefore, since the act has been passed, it is perfectly legitimate for a body of men to form such a combination, although the object of their associating together may be to do something that will result in the restraint of trade. The 34 & 35 Vict. c. 32 (Criminal Law Amendment Act) the object of passing which was that when the legislature was permitting a combination of the character and description such as that which is mentioned in the Trades' Union Act, it was necessary that every precaution should be thrown round the persons engaged in those combinations, in order to protect the members of those combinations on the one hand and the masters on the other, plainly and distinctly shows what the offenses are of which these persons could be guilty. Under these circumstances, the legislature in 1871 has taken a review of all the offenses that would be likely to be committed in reference to these combinations, and by the act of parliament then passed we are bound. If a conspiracy can be a conspiracy that is indictable at all, it must be a conspiracy to do something in reference to this particular act of parliament, and must be guided by evidence such as would be required upon this particular act of parliament. In the first section of the act, which is somewhat difficult of construction, it says, "Any person who shall

do any one or more of the following acts, that is to say: (1) use violence to any person. (2) Threaten or intimidate any person in such a manner as would justify a justice of the peace, upon complaint made to him to bind over the person, so threatening or intimidating, to keep the peace. (3) Molest or obstruct any person in the manner defined by this section." Therefore, passing over the first two heads, which have no reference to the present case (as they do not seem to operate at all), the question is — if this statute has created the offenses by workmen against their masters and no offenses, other than defined by the statute, can be charged against them, is there any evidence here to show a molestation, or obstruction, or a conspiracy to molest or **331]** obstruct, *in the terms, and according to the meaning, of this act of parliament? It must be borne in mind that such must always be done with a view to cause the person, who is a master, to dismiss or cease to employ any workman, or being a workman to quit any employment, "or return work before it is finished," "being a master, not to offer or being a workman, not to accept any employment or work; being a master or workman, to belong or not to belong to any temporary or permanent association or combination; being a master or workman, to pay any fine or penalty imposed by any association or combination; being a master, to alter the mode of carrying on his business or the number or description of persons employed by him." The section goes on to say that a person so offending shall be liable to imprisonment with hard labor for any term not exceeding three months. But this is, if he shall molest or obstruct any master, for example, or any man, for the purpose of coercing him to do any of the things mentioned. Then it goes on to say, "A person for the purposes of this act shall be deemed to molest or obstruct another person in any of the following cases, that is to say, if he persistently follow such persons about from place to place; if he hide any tools, clothes, or other property owned or used by such person, or deprive him of or hinder him in the use thereof; if he watch or beset the house or place where such person resides or works, or carries on business or happens to be, or the approach to such house or place, or if with two or more other persons he follows such person in a disorderly manner in or through any street or road." The "molesting or obstructing" must partake, as far as the facts in support are concerned, of the three matters I have mentioned. Then the act goes on to say, that nothing in this section shall prevent any person from being liable under any other act or otherwise to any higher punishment than is provided by this section, so that no person be punished twice for the same offence, provided that no person shall be liable to any

punishment for doing or conspiring to do any act, on the ground that such act restrains or tends to restrain the free course of trade, unless that act is one of the acts herein before specified in this section, and is done with the object of coercing as before mentioned. It is clear, therefore, that in 1871 the legislature was passing a statute regulating all the relations between masters and servants; and by those provisions they practically say that there shall be no other offense as between master and servant but the offenses detailed in the preceding part of this section.

[BRETT, J. Does it; where does it say that?] The words I have just read bear that construction. [BRETT, J. What is the rule of construction as applicable to the present case? If these statutes create an offense, then in order to make out the offense you must bring it within the statute. But if there were offenses at common law, are those offenses done away with by these statutes? Unless you can find words that say that the only offenses shall be those within these statutes, that would not be so, *would it?] The words are "unless such act [332 is one of the acts hereinbefore specified." If it was not intended to do away with all conspiracies by servants against their masters, and *vice versa*, except those mentioned in the act, it puts both the workman and the master in a worse position than he was before this act of parliament passed, because the act was specially passed to ascertain and define the criminal responsibilities as between master and servant. I contend that it destroys all preceding or hitherto existing offenses; in other words, it consolidates the whole law as it shall and ought to exist. [BRETT, J. You must put your proposition in terms, that all conspiracies between servants as against their masters with regard to those relations, or all conspiracies by masters as against their servants, which were illegal before are legal now, unless they are forbidden by that statute.] That, my lord, is exactly the position I am contending for and take up. Referring to the particular form of the indictment, I say that the counts are bad, as they ought to have the relation of an offense, and ought to have followed the terms of the act of parliament. [BRETT, J. You are applying to quash the indictment. To do so you must make out two propositions; first, that the counts are bad; and secondly, if they are, that this is the right time to quash them.] I may at any time take objection to the form of the indictment. There is the further proposition, that in respect to some of the counts there is no evidence to go to the jury. I refer to the first count, and to the second, which practically repeats it: (read first and second counts). [BRETT, J. First of all, what do you say as to whether this is a good cou-

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spiracy (if it is made out, of course), at common law before the statute?] I am inclined to think it was prior to the statute, as it would be an unlawful combination between these parties, by threats and menaces, to induce some person, who was in a position to do a certain thing, to do that certain thing. [BRETT, J. Not merely on the ground that it was in restraint of trade, because it might be without threats and menaces, not merely on that ground, but because it is an attempt to interfere with the liberty of the man's will in the conduct of his trade, by menaces and threats. These grounds are not touched by the Trades Union Act. Let us see whether such a conspiracy, good at common law, is or is not within this statute.] I should say it is within the statute; but in order to support it, that is, as to the requisite proof, it would come under the third head of the early portion of the section, viz., "molesting or obstructing in order to induce or coerce the master to do something specified in the act," and there ought to be proof that there was such a "molestation or obstruction" as was contemplated by the act of parliament. [BRETT, J. Molestation or obstruction by "one" workman is now made an offense. It was not so before this statute.] Yes; there is a provision at the end of the section with reference to what matter an indictment for conspiracy may be preferred. [BRETT, J. "Conspiring to do an act on the *ground that such act restrains or tends to restrain the free force of trade."]

What you have to meet is this: The prosecution will say, this is not a conspiracy charged upon the ground that it was an act which tends to restrain the free course of trade, but it is a conspiracy founded upon an interference with a person's free will, by threats and intimidations.] All this must of necessity have been taken into consideration at the time the act passed, and if the legislature had intended to give any force to the latter contention, they would have done so, knowing the unwillingness there is on the part of the judges to allow indictments at common law to be preferred. As they have not done so, it must be presumed that no such offense exists. The same remarks apply to the second count of the indictment. Next, as to the third count. Where one has to consider the contracts which were entered into between the company and the various persons employed by them, it runs as follows: "And the said workmen and laborers under and by virtue of certain lawful contracts made between the said Gas Light and Coke Company and the said servants, workmen, and laborers in that behalf, and had hired and employed the said John Bunn, and others." setting out the various persons "as workmen and laborers under the said contracts, and the said servants, workmen, and

laborers had severally in and by the said contracts agreed not to leave the service of the said company without due notice of their intention of doing so," then it goes on to allege that they "devising to injure, prejudice, and annoy the said company, and to hinder and prevent the said company from carrying on, using, and exercising their said trade and business, unlawfully did conspire, combine, confederate, and agree together amongst themselves by divers unlawful ways, contrivances, and stratagems, unlawfully to break the said contracts respectively, and that they and others, servants, workmen, and laborers, should depart from their said service and hiring, and should not give respectively to the said company any notice in pursuance of the said contracts respectively of their intention so to depart from their said hiring and employment." The meaning of this count is that these parties conspired among themselves, they being parties bound by a legal contract created by statute, both themselves to leave the employment without proper notice, and to induce others also in the same employment to do so as well. [BRETT, J. Not simply to leave the employ, but, after having entered into contracts binding upon them according to law, and so binding that if they break them they are liable to criminal punishment, they conspire and agree together that these persons should break their contracts made according to the law, and, according to the criminal law, for the purpose of interfering with their masters.] Just so, that is what I was anxious to put as my proposition. The main point one has to consider at the outset of the count is, were these persons within the act of parliament? [BRETT, J. That goes to a question of whether there is any evidence upon this count for the purpose of quashing it, or saying it is a bad count; you must assume that the contract is what it is stated to be.] I say, the whole indictment should be quashed, as substantially what is stated in the first count is repeated in the other counts; the same remarks apply to each of them. [BRETT, J. Do you maintain your proposition that this third count is bad on the face of it?] No, only that there is no evidence to go to the jury upon it. I have no complaint, in point of law, to make upon any other counts. [BRETT, J. Now return to your first count. Supposing that is a good count, what do you say about the evidence?] As regards that I can scarcely, I think, ask you to say there is not some evidence to go to the jury; but as to the third count, I say that there is no evidence to go to the jury on that count, because, alleging, as it does, that a contract has been entered into between the company and these various persons. [BRETT, J. As I understand you, your first point is that there is no evidence of a contract, for the breach of which a workman might

be summarily convicted. Why not?] Because the defendants do not come within the terms of any of the acts of parliament relating to masters and servants which gives that criminal remedy to the master. The words of the 30th and 31st of Victoria are as follows: "In this act the following words and expressions shall have the several meanings assigned to them unless there is anything in the context repugnant to such construction: the word 'Employed,' reading it as it is here, no doubt, very broad, 'shall include any servant, artificer, laborer, apprentice, or other person, whether under the age of twenty-one or above that age, who has entered into a contract of service with any employer.' " If that stood by itself, it would be all very well, but on turning to the third section I find that we are relegated back to all the old statutes as to what "employ" means. The words are: "Nothing in this act shall apply to any contract of service other than a contract within the meaning the enactments described in the first schedule to this act." And in that first schedule are included all the various acts of parliament that have regulated the relations between masters and servants. It goes on, "or some or one of them, or to any employer or employed, other than the parties to a contract of service to which this act applies as aforesaid, or to any case, matter, or thing arising under or relating to any contract of service or arising between employer and employed other than cases, matters, and things to which the said enactments respectively apply; and in respect of all contracts of service, employers, employed, cases, matters, and things to which this act applies, the respective provisions of this act shall be deemed to be, and are hereby substituted for such of the said enactments, or so much or such parts of the same as would have applied thereto if this act had not been passed; but any proceedings at the passing of this act pending under the said enactments, or any of them, may be continued and prosecuted as if this act had not been passed." Take, for example, the term "laborer" in 335] *the old act: that means a laborer in its direct immediate sense, namely, a laborer in the field.

[BRETT, J. Under this act the expression "employed" is defined, and when you come to what "contract" means, that is also defined. It is to be such a contract as is contained in the former statute.] I have had no opportunity of looking through all the statutes; it certainly does appear so at the first glance. [BRETT, J. The same definitions would apply to the second count.] Yes; and perhaps to the third. [BRETT, J. You admit that if this is a contract within the statute, if this is a contract for the breach of which there might be a summary conviction, there is evidence to go to the jury of a conspiracy

to molest the master, or to control his free will in his trade by means of breaking, criminally breaking, these contracts.] I could not say that it is not a question for the jury. [Brett, J. I say then that there is evidence to go the jury.]

Montague Williams. I submit there is no evidence to go to the jury of any conspiracy, upon the ground that if the defendants were punishable at all, they were punishable singly as individuals under the Masters and Servants Act, there being no evidence as it stands at present of such a combination between these parties as to constitute a conspiracy. The evidence at present, on the part of the crown, is this, that when the defendants went on Monday morning there was no intention on their part, nor were they aware of any intention, either to leave work or quit their employment. The mere fact of five hundred men standing together, without any previous concert, or without any evidence of previous concert, and three men saying "I don't intend to work," would not be sufficient evidence to constitute a conspiracy. [BRETT, J. If they agree together, even at the last moment, that would be a conspiracy.] There is no evidence to go to the jury of any such agreement. The mere fact of certain members of the gang (say five hundred if you like) when addressed, saying one after the other, "I don't intend to work," unless there is evidence of previous concert, cannot be evidence of such a conspiracy as would be punishable by the criminal law, or in point of fact of any conspiracy whatever. [BRETT, J. Do you mean, that there was no agreement, if five hundred persons, all in the same position, with regard to their masters, upon the allegation of some fact which concerns each of them both individually and collectively, leave the employment at the same moment? Do you think that is a fortuitous case of individual free will all round, that the same idea struck them all at the same moment individually? Do you mean that there must be evidence of some positive arrangement? Is not an agreement to be inferred from the acts of persons without any evidence of any positive agreement?] Could it be said during the recent police strike, that the fact of a number of policemen being at the police station, and one and all at the same moment saying, without any previous consent, that they would not go out on duty, would be a conspiracy. [BRETT, J. No. I don't say it would, I ask *you.] The present case appears to me to be much the same thing. [BRETT, J. Is there not something more here than the mere fact of five hundred men all leaving at the same moment? Are there not expressions used by some of them, and by some of the defendants, which seem to go further than that?] Singly, no doubt, they would be liable under the Masters and Servants Act, to be

dealt with summarily. I do not dispute that, but there is no sufficient evidence of combination as would make them responsible to a criminal indictment for conspiracy.

Giffard, Q.C. As to the two first counts being bad, I take it that the meaning of the two statutes quoted is (what the language of the sections themselves express) that where an act is alleged, simply from the fact that it tends to restrain trade, to be unlawful, then the argument put forward might or might not be well founded. I don't say there is, but there might be, a color for such an argument from the fact that there is a proviso with reference to a charge of conspiracy in restraint of trade in the act. The fallacy arises from confusing what is in restraint of trade with that which is in restraint of trade and in restraint of something else as well, viz., in restraint of personal free will. This indictment does not rest upon any principle that it is unlawful to restrain trade, but it rests upon the principle that it is unlawful to coerce a man's will by threats. Neither of the acts quoted touch that point. The allegation here is that they conspired, "contrary to the free will of Mr. Trewby," to force and extort from him a promise that he would do something that he did not wish to do, that they conspired to do that, and that the mode by which that conspiracy was to be carried out was by intimidation. [BRETT, J. So far as the count on the face of it goes, it may be said that it is within this section, because it is by threats and menaces, and the section says, "whoever shall threaten or intimidate any person." It may be that on the face of this indictment it goes that length.] No doubt, but I submit that threats and intimidation, do not, either under the statute, or at common law, necessarily mean threats of personal violence. [BRETT, J. They do in this section. It says, "such threats and intimidations as would justify a justice of the peace doing so and so;" and on the face of the indictment it might be said that the threats and menaces there set out were the threats and menaces as contemplated by the statute.] The gist of this indictment in these counts is not at all the offense being in restraint of trade. The act of parliament does not apply to the present case, as no part of it contemplates a repeal of the common law. Suppose this had been a conspiracy to cut off the gas pipes, could it be said, if these men were to conspire that all of them should cut off the gas pipes and tell their master that they were going to do so, such an act would not be within the words of the section? They could not under such circumstances be held to bail by a magistrate for any threats or personal violence, but could it be contended that 337] *they would not be indictable for conspiracy at common law.

The argument on the other side must go, even if it has not done so already, to this extent, or it proves nothing, that the act of parliament has exhausted the law on the subject of conspiracy in relation to master and servant—that everything must be included in that section, and however illegal it might be at common law, all not included is rendered lawful, because omitted from the section. No authority has been quoted for such a proposition, and it certainly contravenes the ordinary rules of construction. [BRETT, J. Is there not evidence of a molesting of the master with a view to coerce him to alter the mode of carrying on his business, as to the number of persons employed by him? What else was done to this master except interfering with his trade?] That is an interfering with his will. [BRETT, J. His will in his trade.] The indictment would probably be good for molesting the master in restraint of his trade; if they combined to leave him at the just termination of his notice, that would have been in restraint of trade, and but for the act of parliament such persons might have been criminally responsible for doing it. [BRETT, J. That refers to the third count. With regard, however, to the first count, which is “by threats and menaces, and other unlawful means,” to take back a workman against his will.] The matter with which this statute is dealing is totally different. The meaning of it, I suppose, is something of this kind, viz., to limit the definition of words which had been familiar in various acts of parliament, “molesting, obstructing, and so on,” and then, I suppose, it occurred to the mind of the person who drew the statute that there might be evasion of the act if the limitation of the language was such as only to apply to the acts of the individual, and that a person could evade its provision by charging a combination of these acts as a conspiracy; and hence the framer intended probably that any such evasion of its meaning and purport should not be made. If my contention is the right one, viz., that the act has no reference to the conspiracy charged in the first count, then the proviso can have no operation. In other words, the common law conspiracy of combining by threats and intimidation to coerce a man’s will is not at all within the statute. The real question is, whether this is a good count at common law or not. And so as to the second count. As to the third count, the objection is, that it is not proved by the evidence. [BRETT, J. This is amply within the 30 & 31 Vict. As far as regards the questions for the jury, you are content, I suppose, that they should give their verdict on the third count.] On that or the tenth, which sets out a little more in detail the circumstances of the employment and the injury likely to occur from the coercion of the will. [BRETT, J. I shall ask the jury on the sepa-

rate counts. I am of opinion that the first count is a good count at common law, and that it is not touched by the statute to which you have referred. It is not suggested that the third count is not a good one. The only other point taken is, that there is no 338] positive *evidence that these contracts are such for the breach of which a criminal information would lie. No ground was taken for this other than that it was said the defendants were not persons employed within the meaning of 30 & 31 Vict. c. 141. I think that they were persons employed within that definition. I am further of opinion that, as the contract of employment was made between them as persons so employed and their masters, it comes within the statute, and that a criminal information would lie, and properly lie, for a breach of such a contract on the part of the servant. The exception, therefore, taken with regard to there being no evidence upon the third count fails, and there is evidence to go to the jury of a combination between the defendants and other persons.]

After *Straight* and *Williams, M.*, had addressed the jury,

BRETT, J., in summing up to the jury, said: The defendants are charged with having entered into a criminal conspiracy. It has been stated to you that the result of that conspiracy might have been, if not otherwise prevented, supposing it to have been successful, most lamentable to the public. And it has been stated to you on the other side, that even though that may be so, you ought not allow yourselves, in finding your verdict of guilty or not guilty, to be influenced by any such consideration. I entirely agree with the latter part of that observation. You must not allow yourselves to be influenced in coming to a conclusion whether these defendants are guilty or not by the view that from there being an agreement between the defendants to cease work, it would have had a most lamentable effect upon the city and the public. I entirely agree that so far as these men were the servants of the gas company they had no obligation whatever with regard to the public; that they had no greater obligation to the public than anybody else had, than any of us. They had entered into no agreement with the public, the public paid them nothing for their labor, and they were under no further obligation to the public than any other of the queen's subjects. The question which you will have to determine is whether, as servants of the gas company, they or some of them have been guilty of a criminal conspiracy. In order to come to that conclusion, you must answer in the affirmative or the negative the questions which I shall ask you. If you answer them in one way the defendants are guilty and it will be your duty to say that they are guilty. But if you answer them in another way it will be your duty to say they are

not guilty. The definition of a conspiracy generally is this : If persons agree together to do some unlawful thing, and proceed to do it, they are guilty of a conspiracy ; or if they agree to do a lawful thing by unlawful means, and proceed to carry out their agreement by those means, they are guilty of a conspiracy. I say, that if they proceed to carry them out (for it signifies not whether they do carry them out) they are guilty of conspiracy. Therefore, a conspiracy consists of *an agree- [339] ment between two or more persons — an agreement, observe — to do an unlawful thing, or an agreement to do that which is lawful by unlawful means. For instance, if two persons were to agree that one or both of them should shoot another, that would be clearly doing an unlawful thing ; or if two persons should agree together that one of them should, by making false representations as to his means, induce a young woman to marry him, although the fact of inducing a young woman to marry is not an unlawful thing, yet if two persons were to induce a young person to marry one of them by false representations, that would be an agreement between them to do a lawful thing by unlawful means. These instances will enable you to understand the law as I am putting it to you. Therefore you will have to consider whether these defendants, or two of them, or more, have agreed together to do an unlawful act, or to do a lawful act by unlawful means.

Upon an indictment for conspiracy, you cannot find one man only guilty, because, if one man only has been concerned in a matter, there is no agreement. But if five men are before you indicted for a conspiracy, you are not bound to find them all guilty ; you may draw a distinction between them, you may come to the conclusion that two of them, or three of them, or that all five of them, are guilty. These men are indicted for a conspiracy, not only between themselves, as though they were the only conspirators, but they are indicted for conspiring among themselves and with other persons, although, as those other persons are not here, you cannot, of course, find those other persons guilty so as to make them amenable to the law. But it does not follow because other persons were guilty with the defendants, that if you think the defendants guilty, you should not find them guilty. You are to deal with their case alone, and with due regard to the case of each of them. Now, I shall ask your opinion as to this conspiracy in two forms. You have heard a discussion with regard to the mode in which this conspiracy is charged. It is charged in a different form, perhaps not very substantially different, but still in a different form, and I shall ask you, with regard to both, whether there is the one kind of conspiracy to which I shall first ask your opinion, or

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whether there is the other kind of conspiracy as to which I shall subsequently ask you. Now I shall first ask you this: Was there an agreement, or combination, which is practically the same thing, between the defendants, or between the defendants or others, or by some of them, to force Mr. Trewby, or the Gas Company, to conduct the business of the company contrary to their own will by an improper threat, or improper molestation; and I tell you that there is improper molestation if there is anything done with an improper intent, which you shall think is annoyance or an unjustifiable interference, and which in your judgment would have the effect of annoying or interfering with the minds of the persons carrying on such a business as this Gas Company was conducting. It is not necessary, in order that 340] *there should be a conspiracy to molest, that any one should be personally molested. It is enough if you should think that a molestation was designed and agreed upon with an improper intent, and which in your judgments would be an annoyance and an unjustifiable interference, and would in your belief be likely to have a deterring effect upon the minds of the employers — that is to say, of Mr. Trewby or the Gas Company. I tell you that the mere fact of these men being members of a trade-union is not illegal and ought not to be pressed against them in the least. The mere fact of their leaving their work — although they were bound by contract, and although they broke their contract — I say the mere fact of their leaving their work and breaking their contract — is not a sufficient ground for you to find them guilty upon this indictment. This would be of no consequence of itself, but only as evidence of something else. But if there was an agreement among the defendants by improper molestation to control the will of the employers, then I tell you that that would be an illegal conspiracy at common law, and that such an offense is not abrogated by the Criminal Law Amendment Act, which you have heard referred to. This is a charge of conspiracy at common law, and if you think that there was an agreement and combination between the defendants, or some of them, and others, to interfere with the masters by molesting them, so as to control their will; and if you think that the molestation which was so agreed upon was such as would be likely, in the minds of men of ordinary nerve, to deter them from carrying on their business according to their own will, then I say that is an illegal conspiracy, for which these defendants are liable. That, gentlemen, is as to the first set of counts. But this conspiracy is charged in another form, and in that other form the real charge is that they either agreed to do an unlawful act, or to do a lawful act by unlawful means; and it seems to me more naturally to fall under the latter class. I shall,

therefore, ask you whether there was an agreement or combination between the defendants and others to hinder and prevent the company from carrying on and exercising their business, by means of the men simultaneously breaking the contracts of service which they had entered into with the company. And I tell you that the breach without just cause of such contracts as have been proved in this case is an illegal act by the servant who does it. It is an illegal act, and what is more, it is a criminal act — that is to say, it is an act which makes each of them liable to the criminal law — and therefore, if they did agree to interfere with the exercise of their employers' business by simultaneously breaking such contracts — even if you were to suppose that to interfere with the exercise of their employers' business was a lawful thing for them to do — yet if they agreed and combined to do that lawful act by the unlawful means of simultaneously breaking all these contracts, they were then agreeing to do that which may be assumed to be a lawful act by unlawful means, and that would bring them within the definition of a conspiracy. In such case you will say, if you think that so it was, that they were guilty upon the second set of counts. [341]

Now, with regard to all this, what is the evidence. You find that these men and others, making up the number of five hundred men, were all in the employment of this Gas Company, and that Mr. Trewby was the foreman or person in authority managing for the company; and you find that there was another gas company called the Independent Gas Company, which carried on its business at Fulham; and the first thing that you know is that on the 28th of November a man at Fulham was discharged from the gas works there, and that in consequence of that there was a strike of sixty-two workmen at those works at Fulham. That is a circumstance which, because it is referred to, and because it may have been a motive and a ground of action, you must take notice of. Then you have it that, on the night of that same 28th of November, on the night of that same day when this thing happened at Fulham, in what they call the long spell at the works of the prosecuting company, that is, between twelve and half-past twelve at night, there was a meeting on the works of the night gang. The men who are on the night gang, some two hundred and fifty of them, do not work all the night, but they must remain on the premises all the night; but between twelve and half-past twelve is the time when they are not at work, and is the longest interval, as I should judge from the meaning of the terms "long spell," at which they are not at work during the night. There was a meeting on that night. On Friday night, the 29th of November, that is, the next night, the defendant Wilson came in and made

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a statement. He said that he was appointed delegate for that night, and must go to the society; that the meeting of the society would be held at some place near Finsbury square. Now, what is a delegate? He is, as you have been told, a person, one of the workmen, or one of the members of the Trade Union, who is elected by his fellows at the works of a particular firm, to go and represent them (that is, the workmen in that employ), at a meeting of the Union, to agree with the other delegates as to what is to be done, and to come back and inform his own constituents what it is they are to do. Then, besides the dismissal of the men at the Fulham works, you have the dismissal of Dilley at these works. Dilley was dismissed because he had refused to do certain work which he was ordered to do, and the reason which he gave at the time was, that it was work which he was not allowed by his Union to do. Therefore, the case stands thus: the man at Fulham had been dismissed, upon which sixty-two men had struck; a man had been dismissed from these works for not doing work which he was not allowed to do according to the laws of the association to which he belonged. Wilson is a delegate from the workmen from these works to the Union; he goes to say that Dilley is to take his pay on Saturday morning, that is, at the end of the week, and if he was paid up to Friday night he was to take it and say no more about it. That was at first not very clear, but it was more fully explained afterwards. The meaning of what Wilson said 342] you are *to gather from these facts, that in every week the company keep back one day's pay. It is not stated why, but you know very often it is for subscription to reading rooms and for the assistance of men when they are sick. I don't know why, but for some reason they keep it back. Not that they do not pay afterwards all that is due; but one day's pay is kept back out of the six that he may earn. If Dilley got his whole pay, therefore, it would show that he was discharged, not that he was to be kept on. If he was paid one day short, it would show that they were keeping him on, and then, so far as Dilley was concerned, there was no grievance at all; but if he got his whole pay then it would show that he was discharged. Now, you will see what was to happen. Wilson said that according to the opinion, not of the men in these works only, but of all the delegates where he had been (for he said this on the 29th and he must have been on the 28th at the delegates' meeting), that if Dilley was paid all his back time he was to take it, and no further notice was to be taken of it until they heard from the delegate meeting. He said further that something had passed at the delegate meeting which he would not divulge to any one, not to his own father if he was to rise out of his grave. Now,

what do you infer from these facts, and from this statement of Wilson's? Nothing was to be done if Dilley was paid in full. If he was paid in full, it showed that he was discharged, and then there was a grievance. At the first blush it would be supposed that if he was paid in full and discharged, the men would be called upon to act at once. But no; the opinion of the delegates is that under these circumstances you are not to act at once, but what you are to do is to wait until you hear from the delegate meeting. And something passed at the delegate meeting which was secret; because, of course, the form of speech about his father was mere exaggeration on the part of Wilson; it meant that the decision of the delegates was to be kept secret. "You are not to act now, you are to act when the delegates send you word." Is not that the meaning of it? The inference you must consider is whether the meaning is not, "don't you go out now, because there may be arrangements to be made. If this man is discharged, and you are so ordered by the delegates, you will have to go out; but it will be when all the other men who are members of the Union, and not only you at these works, are going out at the same time." It is for you, of course, as a jury exercising your judgment fairly as between these defendants and the law, to say what is the meaning of it; and what is the meaning of that which Wilson said. The witness who proves it says, "I cannot say the other defendants were there. I believe that we were all there, but I can't say." Then he is cross-examined and he says, "Jones on the Thursday night had ceased to be a delegate, and Wilson was the delegate for that night, but he was elected as a delegate for that night only." If so, it was on the Thursday night that Wilson attended the meeting of delegates. Before that night Dilley had been discharged, *or was likely to be discharged, or was threatened to be [343 discharged and the men at Fulham had been discharged. Then he comes back from the meeting of the delegates, and on the 29th this is the information that he gives.

Now we have what happened on the Monday morning. The first person that had notice, on the part of the employers, of anything likely to happen, was not Mr. Trewby, but the other man, Leonard. He said: "I am foreman of stokers. On Monday, the 2d of December, I got to the works at ten minutes to six; when I got there I found a great many of the day gang there already; they were standing in the retort house and in the lobbies. I waited for some time to see if they would begin work. Some observations were made; and I then went and fetched Mr. Trewby." Then you have Mr. Trewby. He says the night gang go on at or about five, and come off at about half-past five next morning; they work for about five hours. The change of

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the gangs takes place between six and seven; some come at six, and some at half-past six, and some at seven; those are for different portions of the process. On the 22d of November, he says, the matter was reported about Dilley. "On Monday, the 2d of December, Collier, the foreman, came to me about a quarter to seven in the morning. In consequence of what he told me, I went to the four retort houses on the works; this was a quarter to seven o'clock. I saw the night and day gangs there." Therefore when Mr. Trewby was sent for there must have been this unusual state of things happening; that is to say; that being a quarter to seven, when the night gang would have gone home to bed and the day gang to work, you have the whole five hundred men there; the night gang had stayed on and the day gang had arrived. Before the gang begin to work they usually change their clothing. None of the day gang had changed their clothing in order to go to work, so that you have two hundred and fifty men all doing that which was contrary to the rules. Mr. Trewby further says: "I asked the men what they wanted to see me about;" so that you see the message which had been taken to him was not merely that the men were doing something which he was bound to look after, but that they wanted to see him; and the message sent was not that one man wanted to see him, not that any one individual wanted to see him, but that they all wanted to see him; and when he goes to see them he asks what they wanted to see him about. He says: "I noticed there Jones and Wilson." You recollect, gentlemen, that Wilson is the man that had been to the delegates and made that statement on Friday night the 29th. "I noticed Jones and Wilson standing close to me; I noticed Webb there." Now Webb is a person who took a prominent part, but he is not one of the defendants; he is not here. "I noticed Webb there. They said they wanted to see me about Dilley's case. Webb was the first spokesman. I asked, 'Where are the day gang?' Jones said (one of the defendants): 'The day gang are all here.' I said, why don't you 344] go to work?" Now what was Jones's answer? Not "I have decided;" but "we have decided not to go to work until Dilley is reinstated." He said that in the hearing of the five hundred men who had sent to the superintendent, whom they called the governor, to see them. There they are in front of him. He says, "What do you want with me?" Webb stands forward as the first spokesman. Jones stands forward as a spokesman, and Jones does not say; "I have decided," but, in the face of all these five hundred men he says, "We have decided not to go to work until Dilley is reinstated." Wilson spoke to Mr. Trewby to the same effect; Webb spoke to the

same effect. Therefore you have Wilson the defendant, Jones the defendant, and Webb, who is not here, stepping as it were forward in front of these other workmen, and the statement they all make is, "We have decided not to go to work until Dilley is reinstated." "I said to them (that is, to Webb), as he belonged to the night gang, 'you should have left the works.' It was then past seven o'clock. I said, 'The time has now elapsed when the whole of you should have gone to your work. The company have always behaved liberally towards you. They have conceded all you have asked from time to time, and I call upon all of you who are well disposed towards the company to go on with your work.' What was it that Jones said? "Yes, ask them that." Was that a sarcasm? Mr. Trewby says "'I ask all of you who are well disposed to the company to go to your work,' and Jones says, 'Yes, ask them that.' Not a man stirred, or separated himself from the rest. I asked all those who were well disposed to separate from the rest. I said both to Jones and Wilson, 'Am I to understand that you refuse to go on with your work until Dilley is reinstated?' They (that is Jones and Wilson) said 'Yes.'" Now you must consider what had happened, and what Wilson said on the 29th. They said that Dilley's discharge and the Fulham matter had been put into one. Does that mean that they were to strike, unless the Fulham matter and Dilley's matter were both settled? And if it does mean that, who had put them into one? Was it the persons at these works only that had put them into one? The persons at these works, unless they were combined with others, had no interest in the Fulham works. Had they any combined action with others with regard to the Fulham works, and if so, where was that combination? You know that they sent a delegate to the society; you don't know whether there was a delegate from the Fulham works, but you must ask yourselves what was the meaning of Dilley's discharge and the Fulham matter being put into one. Mr. Trewby goes on: "I said 'I have nothing to do with the affair at Fulham.' These things were said loud enough for the other workmen to hear. They all stood together, but the other workmen said nothing; I told them I would give them ten minutes for consideration; I said that loud enough for them to hear. I went away into the stoker's lobby. I saw a man named Simmons in the lobby and in consequence of what Simmons said to me I asked, [345 when I got back, for Bunn and Ray, who are two of the defendants." You have heard of Wilson, Jones, and Dilley, now you hear of Bunn, and Ray, and Webb. You must exercise, of course, to some degree your imagination, so as to get at the truth of what was taking place. Bunn and Ray are there, ac-

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cording to their evidence, and they stand forward. Mr. Trewby proceeds: "I said to them, 'Am I to understand that you refuse to go on with your work, till Dilley is reinstated?' They said, 'Yes.' I said, 'You know that you are acting illegally, that you can't leave your work without notice, that some of you are under a monthly agreement and some under a weekly agreement, and you must not leave your work without giving us proper notice. I will give you ten minutes more for consideration, and then you will let me know the result.' Jones said, 'Well, we may as well tell you at once, we have made up our minds.' I said, 'I will let you have ten minutes for reflection.' I then went away, and in about ten minutes I returned and Jones again said, 'We are of the same opinion.' Jones, Bunn, Ray, and Webb were there then; I won't be sure about Wilson being there then. The gangs were still there, not so many as there had been. Jones said, 'They were still of the same opinion.' I said, 'Very well! then I will reinstate Dilley, but I reinstate him under protest; now go on with your work.' Webb said, 'that they did not know what I meant by protest.' I said, 'Do you?' and he said, 'Yes.' I said, 'Perhaps you will explain it to them.' He said to the men (that is to the body of the men), 'The governor means to punish you.' He said to me, 'Will you withdraw that word?' I said, 'How can I? You insist upon Dilley being reinstated, and I reinstate him under protest' I said to the men (that is the body of men) 'Now go on with your work.' Webb said, answering for the men, 'We may as well tell you that we cannot go on with our work until the men at Fulham are let in.'" They go away again, you see, from Dilley's case and now it is that they cannot go on with their work until the men at Fulham who are out, the sixty-two men, are let in. Mr. Trewby said, "That is a matter with which I have nothing whatever to do, and I can do no further in it." They said they could not go to work until they had orders from their delegate meeting.

I have pointed out to you what took place at the beginning. Wilson went to the delegates' meeting, and the order was "Don't act at once, only act when you receive orders." Then all this contest, and then, at the end, what is said in the face of these men is, that they could not go to work until they had received orders from their delegates' meeting. Mr. Trewby further deposes: "Webb said that, and I left them to consult with my assistants and foreman. The night and day gangs then walked off in a body. I saw Dilley walking away with the other men." Therefore, you have here evidence that all these five defendants were present, and there is evidence of their being seen at different parts of the transaction during which they were

*present with the five hundred. You have now heard [346 what took place. You have heard that the manager is sent for, that he goes, and there are all the men — those who ought to have been away from the works as well as those who ought to have been at work — collected, not prepared for work, but standing there as one body, and these defendants one after another acting as spokesmen between them. You have it that these two terms were insisted upon, namely, that Dilley should be reinstated, and that the Fulham men should be reinstated also, otherwise they would not go to work; and then it is said, “We cannot go to work until we have received orders from the delegate meeting;” and then upon the manager (who had agreed to reinstate Dilley, although under protest), refusing to take any responsibility with regard to the Fulham matter because he could not, all the men go off in a body leaving the works there without men to work them. There was no violence of demeanor, nor threatening of any sort by any of the men, that is to say, you are to take it that no threats of any personal violence were made, either with regard to Mr. Trewby, or with regard to the other workmen, except that which was hinted, but which was practically given up, and which I think, therefore, you ought not to take into account, namely, the threat to the Germans. You may take it substantially that whatever was done by these men was not done by threats or personal violence, either to the employers or to each other. The evidence of what was done is before you. It is for you to say whether this evidence proves to you that there was an agreement amongst these defendants, and practically amongst all the others, because, whether they were more or less willing is unimportant, if they succumbed and did agree in the combination that unless their demands with regard to Dilley, and also perhaps with regard to the Fulham men, were complied with they would cease work. You have to say whether in your judgment that was not an agreement, not merely to cease work, but to cease work simultaneously and without notice, because as to this what the manager said is most important. He said “You have no right to leave your work without giving us proper notice.” Well, according to those contracts, they had not. What would have been the result if they had given notice? Why obviously that the company would have had an opportunity to get workmen somewhere else. But if they went away without giving notice, and simultaneously, what would be the consequence to the company? You must ask yourselves whether, in all human probability, it would not have been that the company would have been left without workmen at all, and unable therefore to supply more than the quantity of gas which they had in store, and you have

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heard that they had not storage for more than a third of what they make in the day. That would seem to show that they could not rely on their storage for the supply of more than a single day. You then have the evidence of three or four men [347] who were employed, Roffey and others, who tell you *that they arrived at these gas works in the morning at their usual time, about six o'clock.

Roffey says, "I saw all the defendants there when I arrived. Dilley told me if I did not go with the rest I should be spotted." That is going further than anybody else has done; it is not merely an agreement to stop work, but it certainly is a kind of threat and annoyance — and a terrible annoyance — to this man from Dilley. There is, as far as I can see, no evidence that the others combined in that threat, but it is a lamentable thing that Dilley should threaten a man with that which for a workman is as great a crime as he could very well commit — a moral crime as against a fellow workman to say to him "Mind! you shan't follow your own will; if you do you shall be spotted;" that is to say, you shall be sneered at and be considered degraded by all the men of your own position and by your fellow workmen. Gentlemen, you must not allow that to weigh against the other defendants in this case, because there does not seem to be any evidence against them of a conspiracy to be carried out in that manner. Penn says, "I saw Dilley when I went: I stripped for work; Dilley asked where I was going; I said to work. He told me to put my clothes on, or I must put up with the consequence of it." But again, this is only Dilley. Byes said, "I went and saw Bunn there and he asked me where I was going; I told him I was going to work; he said 'There is no work to day, the work is stopped.'" Now you know the work was not stopped by the employers. The work was stopped, if by anybody, by the agreement of these men among themselves. I asked him what for? he told me to go to the Castle Tavern, in the Barking road, and I should know." This introduces a subsequent feature, which can only be of importance in order to lead your minds to this; was there a combination or agreement? We have here Bunn, and I think we have also Dilley, telling the man to go to the Barking road. But that is not of so much importance as this. You will find that all the men did go to the Barking road, and to a tavern called the Castle Tavern. So you have not only the fact of all the men leaving simultaneously, but you have also the fact of their all going to the same place, their rendezvous. "I saw Jones and Ray there. I said to Jones, 'What is the matter?' He told me it was all through Dilley and the men at Fulham; he told me that Collier had asked him to call the men together to ask them

if they would go to work and the men said no. Collier told him to ask the firemen to go to work and they said no." Then you have the German witnesses. About them I do not propose to trouble you, as I do not think under the circumstances they carry the case further. They are to the same effect, that they were told not to work. Now, gentlemen, it comes to my mind to be an essential matter for you to consider what was the position of the gas company, and for that purpose you must consider what was the relation between the gas company and the public. As between the gas company and the public, the gas company were supplying the *whole of the city of [348 London, and a great part of what is called the west end of London, with gas. And the gas company would be under contract no doubt to supply a great many persons with gas. But, whether they were under contract or not, you will ask yourselves whether the stoppage of such a large business, and the stoppage of it in that way — namely, that it would reduce the city of London and the suburbs to darkness — whether that would not be a tremendous blow to the company, the employers of these men. I say nothing of the public; but is it not a case in which the men, however little intelligent they might be, would have it in their minds that their employers never would run the risk and take the responsibility of putting the whole of London, or all that part of London which they supplied with gas, into darkness? Then what was the intent in their minds? Was it a wicked intent — that is to say in your judgment was it anything like fair dealing as between master and servant, and between man and man, that the men should agree simultaneously to stop work, and such a work, if they had the intent or the suspicion that by so doing they would put their masters under a terrible responsibility? I must ask you whether, in your judgment, this must not have been in their minds: "If we let our employers know or think we shall go off simultaneously we shall frighten them so with regard to the mode of carrying on their business, that they must alter their mode of doing their business, and therefore they must succumb to our wishes, namely, they must take into their employment the man they have dismissed, and whom they dismissed because it is admitted he refused to do what he was told to do, not upon the ground that it was not within his contract to do it, but upon the ground that somebody not his master had told him he was not to do such work. Is that in your judgment an improper interference with the mode of carrying on the business of the employers? And do you think, from the mode in which it was done, that it was in the minds of the men that it would be interfering with their master's will? Do you think that interference was made under

such circumstances as would control the will of the masters of ordinary nerve under such circumstances? It is to obtain your view of this that I ask you, with regard to this first set of counts — Do you think that a conspiracy is made out against these men; first, that they tried to force the company to conduct their business contrary to the will of the company by an improper threat or improper molestation? Do you think that the defendants agreed together to force the company to conduct their business contrary to their own will — that is, to force the company to employ a man against their will, which man the company, unless so forced, would not employ? Then, do you think that was done by an improper threat or molestation? And in order to arrive at this, I tell you there would be an improper molestation if anything was done with an improper intent which you think was an unjustifiable annoyance and 349] interference with the masters in the*conduct of their business, and which in any business would be such annoyance and interference as would be likely to have a deterring effect upon masters of ordinary nerve. Therefore do you think that the defendants agreed to force their masters to carry on their business in a manner against their will by improper molestation — that is to say, by annoyance or interference which in your minds was so unfair as to be unjustifiable, and which would in your judgments deter masters of ordinary nerve from carrying on their business as they desire, such molestation being of this kind: “Inasmuch as we know you are a gas company lighting a great part of the metropolis, we suggest to you this — Suppose we all leave work at the same moment; if we do, you cannot carry on your business; you must then throw every district into darkness. You dare not do that against your customers and against the public, and therefore you must yield to what we demand.” Was that an improper interference, in your judgment, and was it such an interference as in your judgment would be likely to deter masters of ordinary nerve from carrying on their business according to their own will? If you think that, you must say that these defendants are guilty of the conspiracy. If you think that it is not made out in any one of the circumstances which I have put to you, you must say that the defendants are not guilty. Of course you are at liberty to draw any distinction between these defendants that you may think fit; but it was practically an agreement amongst all the workmen. As it seems to me, there is no distinction between any of the defendants, but the evidence is as nearly as possible equal as to them all; and your verdict will be, I think, that they are all guilty or none. Then comes the other point — Do you think that they agreed to interfere to hinder and pre-

vent the company from carrying on and exercising their business according to their own will by those other means, namely, by simultaneously breaking all the contracts of service into which they had entered.

It has been said that the breaking of these contracts would not be an offense, because they would not be within the Masters and Servants Act. Now, according to that act, the word "employed" shall include any servant or workman who has entered into a contract of service with an employer. It is obvious that these men had all entered into a contract of service with their employers; but not only these men, for the evidence is that all the five hundred men had contracts of service with their employers. Then the act goes on to say that the words, "Contract of service," shall include any contract whether in writing or by parol. Now, to say that these workmen had not entered into a contract by parol seems to me to be absurd. Some of them sign these agreements that have put in, and others go to the works and are paid weekly wages, but with a notice put up in their pay room that they are not to leave and that they are bound not to leave without a week's notice. This is a contract of service and it signifies not whether it was in writing or not. Then, having entered into these contracts, the act says, "Whenever the employed shall neglect or refuse to fulfill his [350] contract, he may be summoned before a magistrate and dealt with summarily." Therefore, the breach of such a contract so made is an offense, and the breach of that contract, I tell you, is an unlawful act. Now the breach suggested is this. They were all entitled to leave the service with notice, but none of them were entitled to leave without notice, and I have pointed out the importance of that in this particular case. If they leave with notice, their places can be supplied; if they leave without notice, that is to say, simultaneously, the five hundred men, their places cannot be supplied. If you think, therefore, that they had entered into an agreement not merely to break their contracts, but to break them simultaneously, do you or do you not think, even if they might break their contracts and cease to work, and even if they might agree to do it, do you or do you not think that was the doing or agreeing to do a lawful act, that is, to leave the employment? Even if you assume it to be a lawful act, do you think this was an agreement to do that lawful act by unlawful means, that is to say, by breaking their contracts, by leaving without notice at one and the same time? And in order to show the spirit and purpose with which they did it, do you think they did it with evil intent, that is, the evil intent of forcing their masters to carry on their business in a way which they knew was contrary to the will of their

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masters? If they did, you will say they are guilty of a conspiracy; if you think they did not, you will say that they are not guilty. Therefore, if you find them guilty of one of these conspiracies, you must say that they are guilty, and perhaps you will tell me of which. It does not at all follow that you may not be of opinion that they are guilty of both conspiracies, and if so you will tell me. As to any trouble, or annoyance, or anger, which they may have caused to the public you must not take that into account. I mean, you must not find them guilty because you think them wicked in that respect. Still, you must take this into account: What had they in their minds with regard to their masters? If you think they are guilty of these conspiracies with regard to their masters you will say so; but if, upon consideration, you doubt it, with regard to all or any of the defendants, you will, of course, give them the benefit of that doubt, and say that they are not guilty. Gentlemen, you will try this case without prejudice, and without any view of what the result may be; and you will say whether, within the law as I have laid it down to you, they are guilty of one or both the conspiracies. If you think they are, you will say that they are guilty; if you think they are not, of one or either, you will say that they are not guilty.

The jury retired at 4.37 to consider their verdict, and returned into court at 4.55, finding all the defendants guilty.

BRETT, J. Do you find them guilty of both kinds of conspiracy that I put to you?

The Foreman. We find them guilty on the 2d.

BRETT, J. Of the second kind of conspiracy, you mean?
351] **The Foreman.* Yes, my lord.

BRETT, J. And not of the first?

The Foreman. Yes.

BRETT, J. May I ask on what account you recommend them to mercy?

The Foreman. On account of their great ignorance and being misled, and their previous good character.

Sentence. Twelve months' imprisonment with hard labor*.

*Her majesty, by the advice of the home secretary (the Right Hon. H. A. Bruce), subsequently remitted eight months' imprisonment, and reduced the sentence to four months' imprisonment with hard labor.

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[12 Cox's Criminal Cases, 353.]

***NORFOLK CIRCUIT. SUFFOLK SPRING ASSIZES. [353]**

1872.

(Before Byles, J.)

REG. v. BULLARD*.

Grand Jury—Deposition of absent witness—Practice.

Upon a bill of indictment being presented, the grand jury made an application for the deposition of an absent witness.

Held, per Byles, J., that they were entitled to peruse the deposition without formal proof that the witness was too ill to travel.

ROBERT BULLARD was charged with unlawfully and maliciously wounding Joseph Cooper, causing grievous bodily harm, at Bentley, on the 22d of July, 1872.

The foreman of the grand jury came into court and asked his lordship for the deposition of an absent witness, without whose evidence they had no materials to find a bill.

BYLES, J., granted the application, and stated that the grand jury were not bound by any rules of evidence. They were a secret tribunal, and might lay by the heels in jail the most powerful man in the country by finding a bill against him, and for that purpose might even read a paragraph from a newspaper.

[12 Cox's Criminal Cases, 354.]

***NORFOLK CIRCUIT. BEDFORD SUMMER ASSIZES.**

1872.

(Before Mr. Justice KEATING).

[354]

REG. v. WILDMAN*

Practice—Indictment found at Quarter Sessions—Trial at the Assizes.

An indictment was found at the county sessions at Bedford against the defendant for obstructing a highway. Upon the certificate of such finding, the defendant was taken before a magistrate and bound by recognizance to appear and plead at the assizes. The indictment was not transmitted to the assizes, but was in the custody of the clerk of the peace.

Held, that the judge of assize had no power to order the clerk of the peace to send the indictment to the assizes: that as it was found at the sessions, and not transmitted for trial at the assizes, the court had no jurisdiction to try the same.

But a second indictment for the same offence being found by the grand jury at the assizes,

*Reported by J. W. COOPER, Esq., Barrister at law.

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Held, that the defendant, being bound to appear by recognizance, must be called upon to plead to the second indictment.

EDMUND WILDMAN was indicted for obstructing a highway at Biggleswade on the 24th of May, 1872, and on divers other days and times up to the 2d of July, 1872. He had been committed to take his trial at the assizes, the indictment having been found at the quarter sessions for the county.

Bulwer, Q.C., and *Graham* for the prosecution.

Naylor for the defendant.

Graham applied to the court to make an order directing the clerk of the peace for the county to return the indictment found to this court. He explained that steps had been taken under sect. 3 of 11 & 12 Vict. c. 42, whereby the defendant had been bound over to appear at these assizes; but the difficulty arose from the fact that, the indictment having been found at the quarter sessions, the clerk of the peace required an order to return it to the clerk of the assize.

KEATING, J. What cognizance have I of the indictment being found? Have I jurisdiction to try such an indictment here?

Graham. I apprehend that, the recognizance being made returnable to the assizes, your lordship has power to make the defendant answer the indictment.

355] *KEATING, J. This is not a case where the indictment been transmitted to this court by the justices, which could have been done had they wished it to have been tried here. There may be reasons for their wishing to try it themselves, and undoubtedly they have the power to do so. The proceedings under the 11 & 12 Vict. c. 42, s. 3, are merely a substitution for a bench warrant.

Graham. The defendant is committed until delivered by course of law, and I apprehend your lordship must deliver him under your commission of jail delivery.

KEATING, J. The indictment is in the custody of the clerk of the peace, who is not an officer of this court. The defendant is committed to these assizes, and if there be no indictment here for him to answer, I shall discharge him by proclamation. The defendant is here to answer an indictment found at quarter sessions, which has not been remitted to this court. I know of no authority whereby I can order the clerk of the peace to send the indictment to this court, for how could that fact appear upon the record?

Graham. Then I shall send up another indictment to the grand jury now sitting.

This was done, and a true bill returned. *Graham* then applied for a bench warrant.

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KEATING, J. I offer no opinion as to the second indictment. I will issue a bench warrant if necessary, but I suppose the defendant is present under his recognizance. I think, therefore, that he must surrender and answer, and I shall direct him to be called and plead to the indictment just found.

Naylor, for the defendant, offered no opposition to this course.

(12 Cox's Criminal Cases, 855).

NORFOLK CIRCUIT. SUFFOLK SUMMER ASSIZES.

1872.

(Before BYLES, J.)

REG. v. KEW AND JACKSON.*

Manslaughter—Contributory negligence.

Contributory negligence is not an answer to a criminal charge, as to a civil action.

The prisoners were indicted for manslaughter. It appeared that on the 2d of June the prisoner Jackson, who was in the employ of Mr. Harris, a farmer, was instructed to take *his master's horse and cart, and drive the prisoner Kew [356 to the Bungay railway station. Being late for the train, Jackson was driving at a furious rate, at full gallop, and ran over a child going to school, and killed it. It was about two o'clock in the afternoon, and there were four or five little children from five to seven years of age going to school unattended by any adult.

Metcalfe and *Simms Reeve*, for the prisoners, contended that there was contributory negligence on behalf of the child running on the road, and that Kew was not liable for the acts of another man's servant, he having no control over the horse, and not having selected either the horse or the driver.

BYLES, J., after reading the evidence, said: Here the mother lets her child go out in the care of another child only seven years of age, and the prisoner Kew is in the vehicle of another man, driven by another man's servant, so not only was Jackson not his servant, but he did not even select him. It has been contended if there was contributory negligence on the children's part then the defendants are not liable. No doubt contributory negligence would be an answer to an action. But who is the plaintiff here? The queen, as representing the nation; and if

* Reported by J. W. COOPER, Esq., Barrister-at-law.

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they were all negligent together I think their negligence would be no defense, even if they had been adults. If they were of opinion that the prisoners were driving at a dangerous pace in a culpably negligent manner, then they are guilty. It was true that Kew was not actually driving, but still a word from him might have prevented the accident. If necessary, he would reserve the question of contributory negligence as a defense for the Court of Criminal Appeal.

The jury acquitted both prisoners.

It is no defense that the injured party by his own negligence contributed to the result if it would not have happened without the defendant's misconduct. 2 Whart. Crim. Law, §§ 1008, 1016.

Nor is it a defense, in cases of homicide, that the immediate cause of death was from a surgical operation, or from medical treatment, if the same became necessary or proper in consequence of an injury by the defendant. Whart. Hom., (1st ed.), 241. 2 Bish. Cr. Law, §§ 637-9 (5th ed.); 2 Whart. Cr. Law § 941. *Commonwealth v. Pike*, 3 Cush., 181; *Regina v. Minnock* 1 Crawf. & Dix, C. C., 45; *Reg v. Quand*, 4 Irish Law Rec., N. S., 259.

Nor is it a defense that if deceased had submitted to surgical or medical treat-

ment he might have recovered. 2 Whart. Cr. Law, § 941; 2 Bish. Cr. Law, § 638. Nor that the surgeons who attended deceased by more diligence or skill could have saved his life. *Commonwealth v. Hackett*, 2 Allen, 136.

If death ensues from a wound given in malice, but not in its nature mortal, but from which, being neglected or mismanaged, the party dies, this will not excuse the person who gave it but he will be guilty of the murder, unless he can make it clearly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct and not the wound itself was the sole cause of his death. *State v. Murphy*, 33 Iowa, 270.

[12 Cox's Criminal Cases, 357.]

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357] *NORTHERN CIRCUIT. CARLISLE.

(Before Mr. Justice Archibald).

REG v. HAGAN.*

Murder—Evidence of motive—Admissibility of.

Expressions denoting a bad feeling toward deceased made use of some time before the crime is committed are admissible in evidence, but the jury must receive them with great caution.

HUGH HAGAN was indicted for the murder of Joseph Hagan at Cleator Moor on December 7, 1872.

Campbell Foster was for the prosecution.

ThurLOW was for the prisoner.

The deceased was an illegitimate child of a widow, Eleanor Hagan, who had previously been the wife of prisoner's cousin. The case for the prosecution was, that he had killed the child, who was eighteen months' old, while it was in bed, and the

*Reported by H. THURLOW, Esq., Barrister at law.

motive assigned was that he had done so as he considered it in the way, and only eating the other childrens' bread. It was no relation of his, however, and he did not contribute to the support of it, or, indeed, of Eleanor Hagan, in any way whatsoever.

Eleanor Hagan was called and said: I am the mother of the deceased. He was eighteen months' old; he was illegitimate. My husband, who died six years ago, was a cousin of the prisoner. The prisoner is no relation of mine; he used often to come and see the children; he did not live in my house; he seemed very fond of them. He was a man of violent passions; would sometimes complain of the children plaguing him. On December 7th, I was at the market, and left my eldest son to look after the house; he came into the market in the afternoon, and made a complaint to me about the prisoner (it was that the prisoner had thrown deceased violently on the bed because it was crying). I came back from the market about 6.45, and found the door of the house locked. Thinking something was wrong, I burst it open, and as it flew open, the prisoner tried to get from me. I shouted "police!" I then went into the bedroom and found deceased bleeding from the nose, with several wounds about the head; he died next morning. No one was in the house but the prisoner when I burst open the door.

**Campbell Foster* was then going to ask witness what [358 prisoner said to her about the child a fortnight ago, but

Thurlow objected on the grounds that it was not evidence; it was made sometime before, and if the learned judge would look at the depositions, he would see that it could only tend to prejudice the case of the prisoner in the eyes of the jury; that a mere use of language denoting illwill or threats made some time ago ought not to be used as evidence against a prisoner when intended merely for prejudice unless at the time he had shown some intention of carrying them out, or had used some violence together with them.

ARCHIBALD, J., said that he would consult *Pollock, B.*, who was in the other court. On his return, he said that after careful consultation with *Pollock, B.*, he had come to the conclusion that it was admissible, but he should tell the jury to receive it with great caution.

Witness then gave the following evidence, which was the evidence objected to: "About a fortnight previous to the 7th of December, the prisoner said to me, 'the child is no good; it's eating the other children's "tommy" (food.)' I told him it was none of his business, he had nothing to do with it."

Other evidence was given to show how death was caused, and the prisoner was found

Guilty.

IN THE
COURT FOR THE HEARING
OF
ADMIRALTY AND ECCLESIASTICAL CASES.

[Law Reports, 8 Admiralty and Ecclesiastical, 553.]

June 10, 1872.

***553]**

***THE WARRIOR**

Collision—Regulations for preventing Collisions at Sea, Articles 15, 18, 19—Duty of Steam-tug with a Vessel in tow to keep out of the Way of a sailing Vessel.

A schooner, close hauled on the starboard tack at night, saw the starboard light and the two towing lights of a steam-tug three points on her port bow about a mile off. The schooner kept her luff. The steam-tug had a fully laden ship in tow, and was steaming against a head wind in the open sea. The steam tug kept her course until it was too late to get out of the way of the schooner, and the steam tug and the schooner came into collision :

Held, that the schooner was right in holding her course, and that the steam-tug was alone to blame.

THIS was a cause of damage instituted on behalf of the owners of the schooner *Triumph* against the steam tug *Warrior*.

The petition alleged that the schooner was close hauled on the starboard tack when those on board her observed the two masthead lights and the green light of the *Warrior* about a mile off and about three points on her port bow. The schooner kept her luff, but the *Warrior* approached the *Triumph*, and notwithstanding that she was loudly hailed by those on board the *Triumph* to put her helm hard a-port she came into collision with the schooner.

The defendants in their answer alleged among other things in substance as follows :

The *Warrior* was towing the ship *Woosung*, of about 800 tons burden, from Liverpool towards Holyhead, and had arrived at a point about five miles east of the Skerries and about four or five miles distant from the Anglesea coast.

The *Woosung* was fully laden, and the *Warrior* was towing with about seventy fathoms of hawser out. It was blowing a strong breeze from the west, and the *Warrior* and her tow were heading west and going about two knots.

At this time the red light of the *Triumph* was seen on the starboard beam of the *Warrior*, and about a mile distant. The *Warrior* kept her course until the *Triumph* was about 100 yards distant and right abeam. The *Warrior* was then hailed from the *Triumph* to go under the schooner's stern, whereupon the master of the *Warrior*, perceiving that the *Triumph* persisted in trying to cross his bows,

gave the order to put the helm hard a-port, and to slow and reverse the engines. This was immediately done, and the head of the Warrior was brought round to about W. N. W., when the Triumph struck the stem of the Warrior with her port side.

The result of the evidence appears from the judgment.

Butt, Q.C., and *P. Myburgh*, for the plaintiffs. The schooner *was bound to keep her course, and the Warrior was [554 bound to keep out of her way. A steam vessel, though she have a ship in tow, is still subject to the rules which apply to steam vessels: *The Cleudon*.⁽¹⁾

Aspinall, Q.C., and *W. C. Gully*, for the defendants. A steam-tug with a ship in tow cannot be manœuvred without great difficulty, and the ordinary rules which apply to steam vessels cannot apply to a steam vessel thus encumbered. The schooner saw the two towing lights, and therefore had notice that the steamer had a vessel in tow, and she ought not to have kept on her course. Even if under ordinary circumstances the 15th article of the "Regulations for Preventing Collisions at Sea" applies to a steam tug with a vessel in tow, yet in the special circumstances of this case it ought not to apply here. The Warrior was towing a heavily laden ship in the open sea against a strong head wind, and the provisions of the 19th article justified a departure from the rule laid down by the 15th article: *The Arthur Gordon* and *The Independence*.⁽²⁾

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE. This is a case of collision between a vessel called the Triumph, of eighty-two tons, with a crew of three hands, and laden with coal, going from Queen's Ferry, in Flintshire, to Dundalk, in Ireland, and the Warrior, a steam tug of seventy-two tons register, with engines of eighty horse power, and manned by a crew of eight hands. The Warrior at the time of the collision was towing a ship called the Woosung, of about 800 tons. The place of collision was four or five miles off the Skerries, to the east of the Skerries. The wind at the time was W., and the tide was flood about three quarters of an hour before high water. The night was what is called dark, but clear, a description with which we are very familiar in this court.

Now the schooner was close hauled on the starboard tack, and heading S. S. W., and, according to her evidence and her narrative, she saw the starboard light and the two towing lights of a steamer three points on her port bow about a mile off. The schooner deliberately, as her master has told us this morning, kept her course, conceiving that she lay under an obligation to do so, *according to the sailing rules. The steamer struck her [555

(1) Lush., 158; 14 Moo. P. C. 92.

(2) Lush., 270; 14 Moo. P. C., 103.

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The Warrior.

on the port quarter, abaft the main rigging, and she sunk soon afterwards. The steamer was towing, as I have said, a ship of 700 or 800 tons, and she saw the port light of the schooner on her starboard beam about a mile off.

Now she says that she did nothing till within 100 yards, and when she had come within that distance, and was continuing to approach the schooner, the schooner hailed her to go astern, which she attempted to do; but she did not quite succeed, and struck the schooner, as I have said.

The articles of the "Regulations for preventing Collisions at Sea," applicable to this case, are the 15th: "If two ships; one of which is a sailing ship and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the sailing ship:" the 18th: "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article:" and the 19th: "In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary, in order to avoid immediate danger."

The steamer's contention is, that her case falls under the 19th rule. There were dangers of navigation, and particular circumstances which justified her in expecting that the schooner would get out of her way, and she alleges that the schooner might safely have done so by tacking, or by going under the stern of the vessel in tow, I presume.

I have, of course, taken the opinion of the elder brethren on these points, and they are of opinion that there were no dangers of navigation, and no special circumstances which justified a departure from the ordinary rule that a steam ship shall keep out of the way of a sailing vessel. On the contrary, they think that the Warrior might have avoided the collision, according to the evidence of her own master, either by starboarding or by porting at an earlier period than she did, or that she might have stopped at an earlier period, in which case again there would have been no collision.

556] *I have considered the case of *The Arthur Gordon* and *The Independence* ⁽¹⁾, but it does not appear to me to affect the conclusion at which I have arrived.

I pronounce the Warrior alone to blame for the collision.

Solicitors for plaintiffs: *Thornely and Archer, Liverpool.*

Solicitors for defendants: *Wright, Stockley & Becket, Liverpool.*

(¹) Lush, 270; 15 Moo. P. C., 103.

[Law Reports, 8 Admiralty & Ecclesiastical, 556.]

June 28, 1872.

THE LE JONET.

Salvage—Right of a Seaman to claim Salvage for Services rendered to his own Vessel.

Two vessels came into collision on the high seas. One of the vessels (a bark) received damage, and all her crew, except her mate, escaped on board the other vessel. The mate of the bark remained on board her, and navigated her until he obtained assistance from a steam vessel. The steam vessel then took the bark in tow and brought her into port in safety, the mate still assisting in her navigation :

Held, that in awarding salvage to the owners, master, and crew of the steam vessel, the right of the mate of the damaged ship to claim salvage reward for his services should be taken into consideration, and that the mate, upon his claim being brought before the court, was entitled to rank as a salvor.

THE bark Le Jonet was run into by the Spanish bark Isabellita Blanca, on the evening of the 3d of April, 1872. The Isabellita Blanca with her starboard side came into collision with the Le Jonet's stem and port bow, cutting down the bowsprit and damaging the stem and port bow. The two vessels held together for some time, during which the master and all the crew of the Le Jonet, except the mate, went on board the Isabellita Blanca. The mate of the Le Jonet remained on board his own vessel. After a little while the vessels got clear, and the mate got the Le Jonet before the wind and kept her before the wind for some hours till the wind moderated, when he laid the vessel by the wind, and at daybreak he hoisted a signal for assistance. The Colletis, an iron screw steam vessel, saw the signal about 5.30 on the morning of the 4th of April, and proceeded to the Le Jonet. Some of the crew of the Colletis went on board the Le Jonet, and a hawser was passed between the two vessels, and the *Le Jonet was towed in safety [557 by the Colletis into the port of Hull. The vessels arrived at Hull about 3 p.m. on the 5th of April. During a portion of the time the Le Jonet was being towed her mate remained at her helm. When the Le Jonet arrived at Hull she had eight feet of water in her hold, and hands were engaged to work at her pumps to prevent her from sinking.

On the 10th of April the present suit was instituted on behalf of the owners, master, and crew of the Colletis against the Le Jonet to recover salvage reward. The Le Jonet was arrested in the suit on the 11th of April, and remained under the arrest of the court until she was sold by an order of the court, made

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The Le Jonet.

on the 4th of June. The net proceeds, after deducting the expenses of the sale, amounted to about 807*l*.

The petition filed on behalf of the plaintiffs set out the facts relating to the services rendered. It also stated that since the arrest of the vessel the owners of the *Colletis* had employed men to keep the *Le Jonet* afloat, and had incurred a considerable sum of money on that account.

The *Colletis* at the time of rendering the services was of the value of 7000*l*., her cargo was of the value of 6500*l*., and her freight was of the value of 113*l*.

The owners of the *Le Jonet*, in answer to the petition, denied some of the statements therein contained; but the main facts of the case were not in dispute. The result of the evidence on the disputed facts will be found stated in the judgment.

E. C. Clarkson appeared for the plaintiffs.

[SIR ROBERT PHILLIMORE. The mate of the *Le Jonet*, who appears to have rendered important services, is not before the court.]

He is not entitled to claim as a salvor, because he cannot claim salvage reward for services rendered to his own vessel: *The Neptune* ⁽¹⁾.

G. Bruce, for the defendants. The mate is entitled to claim salvage reward: *The Warrior* ⁽²⁾; and although he is no party to the present suit, the court, in awarding salvage to the plaintiffs, must bear in mind the services of the mate. The present 558] plaintiffs are not to be rewarded for what the mate has done, and whatever amount the court may think right to award for the whole salvage service, a portion of that must be reserved for the mate, who may yet institute a suit to recover what is due to him.

[SIR ROBERT PHILLIMORE. Surely it will be to the advantage of the parties to save the expense of another suit.]

Bruce. The owners of the *Le Jonet* highly appreciate the gallant conduct of the mate, and will be glad to consent to the court adjudicating upon the claims of the mate in the present suit. They will undertake to pay over to the mate whatever sum the court may declare him to be entitled to.

Clarkson. The plaintiffs in the suit contend that the mate is not entitled to salvage reward, but they are quite willing to consent that the question should be determined in the present suit.

Bruce. The plaintiffs are not entitled to receive the expenses incurred by them in hiring men to pump after the time when the vessel was arrested. During the time the vessel was in the

(1) 1 Hagg. Adm., 227.

(2) Lush., 476.

custody of the marshal of the court he was the person responsible for the vessel, and everything necessary for the safety of the vessel should have been done under his direction.

Clarkson. It was necessary that the pumping should be done by some one, and the expenses must be paid out of the proceeds in one way or another.

SIR ROBERT PHILLIMORE. This is a salvage suit for services rendered to a vessel injured by collision. The bark *Le Jonet* was run into by the Spanish bark *Isabellita Blanca*, on the 3d of April, 1872, between 8.0 and 8.30 P.M., about twenty-five miles S.E. by S. off Lowestoft. The consequence of this collision was that serious damage was inflicted upon the bark *Le Jonet*, and her master, and all her crew, except one man, the mate, went on board the Spanish vessel. The mate, however, remained on board the *Le Jonet* up to the time of the rendering of the salvage service, and until the vessel was placed in safety. The salvaging vessel, the *Colletis*, is an iron screw steamship, navigated by a crew of thirteen hands, and at the time of the collision in question, was on a voyage from Ghent to Hull. She sighted the **Le Jonet* at about 5.30 on the morning [559 after the collision, and immediately went up to her. Some of the crew of the *Colletis*, went in their life boat on board the *Le Jonet*, and found her in great distress, making water, and with her foretopmast and her jib boom gone. There can be no doubt that she had been kept by the exertions of the mate from drifting like a log upon the water. She was in a condition of great peril, even having regard to the actual state of the weather at the time; and if the weather had changed for the worse there is great reason to doubt whether the vessel could have been saved at all.

After clearing the wreck, the salvors took the *Le Jonet* in tow, and after towing her for about thirty-three hours, brought her safely to the port of Hull. In the first place, the salvors claim for a sum of 108*l.* 16*s.*, which was paid by them for pumping and other expenses incurred in dock at Hull. That sum must either be paid as part of the salvage reward or independently of that reward. It cannot be paid in both ways. I consider that it must be paid independently of salvage, and that it must be paid to the plaintiffs, as expenses, although, strictly speaking, it ought to have been defrayed by the marshal. Now it has appeared that there is in this case a salvor who is not, strictly speaking, before the court. I intimated that this was the opinion of the court upon the facts, as they appeared by the pleadings, and the evidence produced before me has greatly strengthened that opinion. I adhere, as Dr. Lushington did in

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The Warrior ⁽¹⁾, to the doctrine laid down by Lord Stowell in *The Neptune* ⁽²⁾, that the crew of a salvaged vessel cannot, under ordinary circumstances, have a *persona standi* as salvors against their own vessel. That principle, I consider, should be maintained in its integrity, but the crew of a salvaged vessel may, by the acts of their master be placed in such a position that the engagement they have entered into is at an end. Dr. Lushington, in *The Warrior*, said, "But there are two ways in which the contract of seamen may be dissolved. It may be dissolved by final abandonment of the ship, or by the act of the master giving the seamen a discharge." In this case, the master abandoned his vessel with all his crew, except the mate, who voluntarily 560] stayed on board, *and the mate's contract with the master, to serve in that capacity, must be considered as at an end. There are two questions which I have to decide. Was the mate's contract at an end, and if it was at an end, and the mate stayed on board voluntarily, did he render salvage service? As to the first question, I decide in the affirmative, and as to the second, I think he did render salvage service, not only in working for the safety of the ship during the night of the collision, and in showing a signal of distress on the morning after, but also in taking the helm after the crew of the *Colletis* came on board. This, I consider, was a very meritorious service indeed, and if the example of courage he set had been followed by the rest of the crew, it is probable there would have been no need of the salvage services of the crew of the *Colletis*. Although the mate is not technically before the court, the owners of the *Le Jonet* have undertaken to give him such sum as I may award. It would be a great waste of money if another suit was instituted, and I shall therefore recommend that he should receive a certain sum. Bearing that in mind, I shall award salvage reward to the owners, masters, and crew of the *Colletis*, as the merits of the case deserve. To the *Colletis* I award 210*l.* I recommend that the owners give 40*l.* to the mate of the *Le Jonet*, making the total sum 250*l.* The expenses of pumping and other expenses paid by the salvors will be paid out of the fund in court, and I shall certify for costs, as I consider it was a proper case to be brought into this court.

Solicitor for plaintiffs: *Thomas Cooper*.

Solicitors for defendants: *Rothery & Co.*

(¹) *Lush.*, 476.

(²) 1 *Hagg. Adm.*, 227.

[Law Reports, 3 Admiralty and Ecclesiastical, 561.]

July 9, 1872.

*THE MIRANDA.

[561

Salvage—Services rendered by one Vessel to another belonging to the same owners.

A steam vessel laden with a general cargo became disabled at sea in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading which contained among the excepted perils "accidents from machinery." Another steam vessel belonging to the same owners fell in with the disabled vessel and towed her into safety :

Held, that the owners of the vessel rendering the service were entitled to recover salvage remuneration against the cargo laden on board the disabled vessel, and that the master and crew of the vessel rendering the service were entitled to recover salvage remuneration against the disabled vessel, her freight and cargo.

THIS was a consolidated cause of salvage carried on on behalf of the owners, master, and crew of the steamship *Roxana* against the cargo lately laden on board the steamship *Miranda* and the owners of the cargo, who were defendants intervening, and on behalf of the master and crew of the *Roxana* against the *Miranda*, and her freight.

From the statements in the pleadings the following facts appeared : The *Miranda* was a screw steam vessel of 735 tons register, and was on a voyage from Patras to London with a cargo of dried fruit. When about from eighteen to twenty miles southeast of Cape St. Vincent it was found that the crank shaft of her engines was so nearly broken in two places that another turn or two of her propeller would have separated it. At this time the *Roxana*, a screw steam vessel of about 674 tons register, proceeding on a voyage from London to Genoa with a cargo of general merchandize, was in sight. The *Miranda* signalled to the *Roxana*, and the *Roxana* came up to the *Miranda*, took her in tow, and towed her into Gibraltar. The *Roxana* was occupied in towing the *Miranda* from about 6.30 P.M. on the 13th of October until 7 A.M. on the 17th. The weather was fine, and the towage was not attended with any danger ; but the towing hawsers of the *Roxana* were damaged, and a considerable quantity of coal was consumed in effecting the service. The damage to the hawsers and the cost of the coal amounted to about 83*l*.

*The answer filed on behalf of the owners of the cargo [562 of the *Miranda* contained the following allegations :

3. The sole owners of the vessel *Miranda* are, and were at the time mentioned in the petition, the plaintiffs, the London Steamship Company, Limited ; and the said plaintiffs are and were at the same time the sole owners also of the vessel *Roxana*.

4. The cargo laden on board the *Miranda* at the time mentioned in the petition was so laden by the several owners thereof, on the terms of certain contracts then

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The Miranda.

entered into between them and the plaintiffs, the London Steamship Company, Limited, whereby the said plaintiffs, contracted with the several owners of the said cargo to carry the said cargo to London for freight, to be by them earned on the usual terms. The act of the plaintiffs, the London Steamship Company, Limited, in towing the Miranda to Gibraltar, was done only in fulfillment of their contract to carry the said cargo to London as aforesaid, or for the purpose of enabling their own vessel to earn the freight on the said cargo, or for the sake of bringing their own vessel safe into port, and was in any case an act done for the sole behalf and advantage of the said plaintiffs, and was not, so far as the said plaintiffs are concerned, a salvage service.

5. The cargo laden on board the Miranda as aforesaid was so laden on the implied condition and warranty that the Miranda was stout, staunch, and strong, and well equipped and fitted, and in all respects seaworthy for the voyage; whereas, in fact, the crank shaft of the after-engine was not sufficiently strong, or there was some other improper fitting in the said after-engine, or otherwise the said implied warranty was not complied with. Wherefore, and for no other cause, the said crank shaft of the after-engine of the Miranda was broken, or nearly broken, as in Article 3 of the petition stated, and the Miranda came in need of and received the assistance of the Roxana, as in the said petition stated.

6. In the circumstances aforesaid the plaintiffs, the London Steamship Company, Limited, are not entitled to any salvage remuneration.

7. The defendants submit to pay such remuneration to the plaintiffs, the master and crew of the Roxana, for the services rendered by them as to this court shall seem just and equitable; but they contend that such remuneration should in the circumstances be of small amount.

The reply was in substance as follows:

1. The cargo laden on board the Miranda at the time mentioned in the petition had been laden on board her by the respective shippers thereof, under certain bills of lading which were in one or other of the three forms annexed hereto. No other contract had been entered into with respect to the carriage of the said cargo.

2. And as to the 5th Article of the said answer, the plaintiffs submit to the judgment of this honorable court whether any such warranty as is alleged in such article was implied or existed, regard being had to the terms of the said bills of lading. The plaintiffs further say that at the time when the Miranda sailed from her respective ports of loading she was in all respects seaworthy for her intended voyage to London.

563] *The first form annexed to the reply was so far as material substance as follows:

Shipped in good order and condition by _____ in and upon the steamship called the Miranda, whereof Dilly is master for this present voyage, and now lying in the port of Zante, and bound for London, with liberty to call at any port or ports in the Mediterranean to sail with or without pilots, to tow and assist vessels in all situations, and to carry goods of all kinds being marked and numbered as per margin, and to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition, at the aforesaid port of London, or so near thereunto as she may safely get (the act of God, the Queen's enemies, pirates, robbers, thieves, restraint of princes and rulers, fire at sea or on shore, accidents of the seas, rivers and navigation, damage by vermin or from other goods by sweating or otherwise, barratry of master and mariners, damage or loss from collision, or from any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship, accidents or damage from machinery, boilers and steam, of whatever nature or kind soever excepted), unto _____ or to his or their assigns, he or they paying freight for the said goods, in cash free of interest, on ship's arrival, at the rate of

In witness,

Dated in Zante this 22d September, 1871.

The other forms were in substance the same, the only difference being in the words describing the excepted perils. The excepted perils mentioned in the second form were nearly the same as those mentioned in the first form, and included "accidents from machinery, boilers, steam, or any other accidents of the seas, rivers, and steam navigation of whatever nature or kind soever." The excepted perils mentioned in the third form were so far as material the same as those mentioned in the first form.

The defendants in their rejoinder denied all statements in the reply inconsistent with the statements in the answer.

It appeared, on the hearing of the cause, that the value of the *Miranda* was 15,000*l.*, the value of her cargo 18,775*l.*, and the value of her freight in course of being earned was 1,875*l.* Evidence was given to show that the *Miranda* was built, fitted, and rigged with a view to depending principally upon her steam power, and that in bad weather she was to a great extent unmanageable under canvas. It was proved that not long before the voyage during which her engines broke down she had been fitted with new boilers and her engines had been tho- [564] roughly overhauled, when no flaw could be detected in the shaft.

Butt, Q. C., and *E. C. Clarkson*, for the owners ⁽¹⁾ of the *Roxana*. It is admitted that salvage is due to the master and crew of the salving vessel, and it is difficult to understand why the owners of the salving vessel should not also be entitled to salvage, because it is clear that if the services had been rendered by any other vessel the owners of the cargo would have been liable to pay salvage to the owners of that vessel. The owners of the *Roxana* were under no obligation to render services to the cargo on board the *Miranda*: *The Maria Jane* ⁽²⁾; *The Sappho*. ⁽³⁾

[*SIR ROBERT PHILLIMORE* referred to the case of *The Le Jonet*. ⁽⁴⁾]

Accidents caused by machinery are among the events which excuse the performance of the contract entered into on the part of the owners of the *Miranda*, so that her owners had no interest in saving the cargo from the danger to which it was exposed by the accident in question.

Mihward, Q. C., and *W. G. F. Phillimore*, for the owners of cargo on board the *Miranda*. The owners of the *Roxana* in rendering assistance to the cargo were only employing their own resources for the purpose of performing their own contract and saving their own freight. The contract entered into by the

⁽¹⁾ They also appeared for the master and crew of the *Roxana*.

⁽²⁾ 14 Jur., 857.

4 ENG. REP.]

⁽³⁾ Ante, p. 142; Law Rep., 8 P. C. 690.

⁽⁴⁾ Ante, p. 556.

plaintiffs as owners of the *Miranda* was a contract to carry the cargo safely, and the contract must be regarded as containing an implied warranty that the vessel was fit to carry the cargo safely, that it was in a seaworthy condition at the time of shipment: *Abbott on Shipping*, American ed., 1846, p. 417, n. 1; *Readhead v. Midland Ry. Co.* ⁽¹⁾; *Putnam v. Wood.* ⁽²⁾ The mere circumstance that the shaft gave way at a time when there was nothing to account for it giving way is evidence that it must **565** have been in a defective condition at the *time when the cargo was shipped: *Arnould on Insurance*, vol. ii., 627. If the owners of the *Miranda* neglected to provide a seaworthy vessel the exceptions in the charterparty have no application because the implied warranty of seaworthiness is a condition precedent to the exceptions becoming operative. Even if the exceptions are to be considered as operative, the accident in question is not within the excepted perils. Accidents from machinery mean accidents causing direct injury to the cargo: *Czech v. General Steam Navigation Co.* ⁽³⁾. The plaintiffs having put the cargo in jeopardy and saddled it with a salvage lien for the salvage due to the master and crew, ought not to be allowed to gain a profit by their own wrong.

Bull, Q.C., in reply. *Tarrabochia v. Hickie* ⁽⁴⁾ shows that a warranty of seaworthiness when expressed in a charterparty is not to be treated as a condition precedent. In the present case there is no such warranty, the only contract is the contract expressed in writing, and no terms can be added to that. There is no evidence whatever to show that the *Miranda* was unseaworthy at the time the cargo was shipped; on the contrary, there is evidence to show that she was seaworthy. If the owners of the cargo rest their case upon the alleged unseaworthiness of the *Miranda* at the time the cargo was shipped, the onus of proving such unseaworthiness rests with them.

SIR ROBERT PHILLMORE. The facts not in controversy and material to mention are these: the *Miranda*, a screw steam vessel, having a valuable cargo on board, received salvage services from the *Roxana*. The *Miranda* was bound to London on a voyage from Patras, while the *Roxana* was proceeding on a voyage from London to Genoa. When the vessels were in sight of each other, and about eighteen or twenty miles to the south east of Cape St. Vincent, the master of the *Miranda* signalled to the *Roxana*, and requested her assistance. The damage the *Miranda* had sustained was this: the crank shaft of her after

⁽¹⁾ Law Rep., 2 Q. B., 412; in Ex. Ch. Law Rep. 4. Q. B., 379.

⁽²⁾ 3 Mass. Rep., 481; and see *Stanton v. Richardson*, Law Rep., 7 C. P., 421.

⁽³⁾ Law Rep., 3 C. P., 14.

⁽⁴⁾ 1 H. & N., 183; 26 L. J. (Ex.), 26.

engine was so nearly broken that another turn or two of her propeller would have separated it. The *Miranda* wished to be towed back to Gibraltar, and she was accordingly taken in tow by the *Roxana*, and was towed into *Gibraltar, the service beginning between six and seven o'clock on the evening of the 13th of October, and ending at about half-past eight on the morning of the 17th of October. The weather was fine at the time, and the service was performed without danger either to the *Roxana* or her crew; but apart from the peculiar circumstances to which I am about to advert the service was a service for which the court would be disposed to award a considerable sum, the value of the property salvaged being high, that is, about 86,000*l.* The court, however, cannot award, and indeed is not asked to award, any salvage remuneration to the owners of the *Roxana*, either on the value of the *Miranda* or on the value of her freight. But the master and crew can according to the decision of the *Suppho* (!) — a decision which has been affirmed on appeal by the judicial committee of the privy council — claim on the entire sum, that is, on the value of the *Miranda*, her cargo and freight.

The defenses raised by the owners of the cargo of the *Miranda* to the claim preferred by the owners of the *Roxana* are the following: First, that the owners of the *Roxana* were bound by their contract with the owners of the cargo laden on board the *Miranda* to carry the cargo of the *Miranda* to London, and that they would not have fulfilled this contract unless they had rendered assistance to the *Miranda*, which assistance is to be considered as an act done for the sole benefit and advantage of the owners of the *Roxana*. Secondly, it was said that implied in the contract between the owners of the *Roxana* and the owners of the cargo of the *Miranda* there was a warranty of the seaworthiness of the *Miranda*; that the accident arose from the breach of such warranty; and that the owners of the *Roxana* therefore were liable for all the consequences of such breach, and so were not entitled to salvage remuneration for averting a loss which, if it had happened, would have fallen upon themselves.

It is replied to these defenses that the contract is to be found in the bills of lading admitted to have been made between the parties.

If I am to decide the question whether the owners of the *Roxana* are entitled to salvage reward, I must first determine *whether they are so entitled apart from the question of [567 their being the owners of the vessel salvaged. I think unquestionably they rendered a salvage service entitling them to salvage

(!) *Ante*, p. 142; *Law Rep.*, 8 C. P., 690.

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remuneration, unless peculiar circumstances have rendered it impossible for them to recover that remuneration.

It becomes necessary, therefore, to decide the question of law. The contract set out in the bills of lading is that the *Miranda* should take her cargo on board, and deliver it at the port of London in the like good order and condition as shipped; then follow many exceptions which are to be considered as affording a justification for the non-performance of the contract, and among these exceptions is included one about which there has been much discussion. This exception, which is contained alike in all the bills of lading, though not always expressed in precisely the same words, is as follows: "Accidents from machinery."

If I had to determine the case upon the point raised with reference to the alleged implied warranty of seaworthiness, I should rule that the burden of proving the breach of such warranty rests with the defendants, and that sufficient evidence as to the vessel's state, and the state of her machinery, has not been given to lead the court to find that she was in an unseaworthy condition at the time the cargo was shipped. But I think the true question in the case is,—Does not the exception, "accidents from machinery," include the present case? I think that I must come to the conclusion that the accident in question finds its place among the excepted perils; it is therefore unnecessary for me to discuss the able argument which has been addressed to the court with respect to a warranty of seaworthiness being implied in the contract.

I have now to consider the amount of the sum to be awarded. I must remember that the *Miranda* was owned by the owners of the *Roxana*, and that the owners of the *Roxana* were earning freight for the carriage of the cargo of the *Miranda*, and that no material deviation from the voyage occurred to the *Roxana* as she towed the *Miranda* in the direction of the port to which she herself was bound. I must also bear in mind that the weather was fine, and that there was no danger.

Under the peculiar circumstances of the case I shall award to 568] *the owners of the *Roxana* 350*l.*, to be paid out of the proceeds of the cargo. Remembering that the ship was the principal agent in rendering the salvage service, I shall award to the master and crew 120*l.*, to be paid out of the proceeds of the ship, freight, and cargo (*).

Solicitors for plaintiffs: *Hillyer, Fenwick, & Stibbard*.

Solicitors for defendants: *Waltons, Bubb, & Walton*.

(*) The Judge was asked to apportion residue to the crew according to their the sum of 120*l.*, and he apportioned it rating.
as follows: 70*l.* to the master, and the

[Law Reports, 8 Admiralty and Ecclesiastical, 583.]

June 25, 1873.

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[583]

Delay in the Prosecution of a Voyage justified by risk of Capture by Enemies' Cruisers — Queen's Enemies — Restraints of Princes and Rulers — Terms of Bill of Lading modified by the Terms of Charterparty.

A charterparty was entered into between an English firm and a Hamburg firm, the owners of the R., a vessel belonging to Hamburg. The charterparty provided that the vessel should proceed to a foreign port and there load a cargo, and there-with proceed to a port within certain limits mentioned — the act of God, the queen's enemies, restraint of princes and rulers, and dangers of the seas excepted. It was provided that the master should sign bills of lading as required, but at not less than the chartered rate, without prejudice to the charterparty. The plaintiffs, with full knowledge of the terms of this charterparty, shipped a cargo at the port of loading under bills of lading by which it was provided that the goods should be delivered at a port within the limits mentioned in the charterparty as ordered, the dangers of the seas only excepted. After the making of the charterparty, and the shipment of the goods, war broke out between the North German Confederation and France. The ship on her homeward voyage sustained damage at sea, and was compelled to put into a neutral port for necessary repairs, and there finding that French cruisers were in the vicinity, she remained for a long time after the necessary repairs were completed, in order to avoid the risk of capture. The risk of capture was such as to render it reasonable and prudent for the master, having regard to the preservation of his ship, to remain in port. On the departure of the cruisers the master sailed on his voyage, and delivered the cargo according to orders, at an English port within the limits mentioned in the charterparty. In a suit brought by the plaintiffs to recover damages for the delay incurred in order to avoid risk of capture:

Held, that the delay was justifiable.

Seemle, that the single exception of dangers of the seas mentioned in the bill of lading did not, under the circumstances, exclude the other exceptions mentioned in the charterparty.

THIS was a cause instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of James Anderson, James George *Skelton Anderson, Alexander Gavin Anderson, [584] and William Richard Anderson, trading under the style or firm of Anderson, Anderson, & Co., as merchants, at No. 1, Billiter Court, Fenchurch street, in the city of London, against the vessel San Roman, and the freight due for the transportation of the cargo now or lately laden therein, and against the defendants Carl Heinrich Willink, Christian August Wilhelm Schon, and Gustav Adolph Schon, all of Hamburg, shipowners, the owners of the said ship San Roman, intervening.

The San Roman was a vessel belonging to Hamburg, an independent city of the North German Confederation, and her owners were subjects of the North German Confederation, and carried on business at Hamburg as Schon & Co. These facts

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were known to the plaintiffs, when early in 1869 they entered into correspondence at London with a broker at Hamburg of the name of Sloman, with reference to chartering the San Roman. Sloman acted for Schon & Co. The result of the correspondence between the plaintiff and Sloman was that the San Roman was chartered by Thomas Bilbe & Co. Thomas Bilbe & Co. were an English firm. In 1869 two of the plaintiffs were members of the firm of Thomas Bilbe & Co., and since December, 1869, until the commencement of the suit, all the plaintiffs were interested in the results of the operations of the firm of Thomas Bilbe & Co.

Two copies of the charterparty were executed.

One copy was expressed to be made on the 13th of February, between Schon & Co., owners of the San Roman and Thomas Bilbe & Co., charterers. It was signed "Aug. Jos. Schon, as owner." "Thomas Bilbe & Co., 26th February, 1869." This was set forth by the plaintiffs in their petition as the charterparty. There was evidence to show that Schon signed this copy at Hamburg.

The other copy, bearing date the 13th of February, 1869, was expressed to be made between Anderson, Thompson, & Co., ⁽¹⁾ for owners, and Thomas Bilbe & Co., charterers, and was signed "by authority by telegraph from R. M. Sloman, of Hamburg, *Anderson, Thompson & Co.," as agents. "Thomas [585 Bilbe & Co. 13/2/69."

The two copies were, as regards their terms, almost identical. The terms were in substance as follows:

That the ship being warranted to be at Antwerp, and every way fitted for the voyage, should, after discharging outward cargo, for owners' benefit, with all convenient speed proceed to a safe landing place in Puget Sound or Burrard's Inlet, as ordered in Royal Roads off Victoria, V.I., or so near thereunto as she might safely get, and there load, as supplied by the agents of the said charterers, a full and complete cargo of spars, ^{and} ^{or} other lawful merchandize which the said charterers bound themselves to supply, and being so loaded should therewith proceed as charterers' agents might order on signing bills of lading, either to a port of discharge direct, within the limits hereinafter mentioned, or to Queenstown or Falmouth ⁽²⁾, for orders for a port of discharge, within the limits or so near thereunto as she might safely get, and should there deliver the cargo

⁽¹⁾ It appeared from answers to interrogatories administered to the plaintiffs that in February, 1869, two of the plaintiffs were partners in the firm of Anderson, Thompson, & Co.

⁽²⁾ In the charterparty signed by Anderson, Thompson, & Co., Cadiz was mentioned as one of the ports of call.

on being paid freight at the following rates per load of fifty cubic feet English customs calliper measurement.

	If ordered from Port of Loading.	If ordered from Queenstown or Falmouth.
A Port in the United Kingdom	95s.	100s.
A Port on the Continent, from Bordeaux to Hamburg, both inclusive	100s.	105s.
A Port in the Baltic	100s.	115s.

In full of all primage, port charges, and pilotages as customary. The freight to be paid on final and right delivery of the cargo, one half in cash, and one half by good and approved bills on London, at three months from same date. The charterparty then proceeded as follows :

The ship to be consigned to and reported by charterers or their agents at the various ports under this charter, paying one consignment commission of two and a half per cent. on the gross weight. The master to sign bills of lading for the cargo as required by charterers or their agents, but at not less than the above chartered rate, without prejudice to this charterparty. The cargo to be [586 brought to and taken from alongside the ship free of risk and expense to the ship.

The vessel to be discharged with all dispatch, in such safe dock or place in the port of discharge as charterers may order.

(The act of God, the queen's enemies, restraints of princes and rulers, frost, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, always mutually excepted).

Forty-five working days are to be allowed the said charterers for supplying the said cargo, and for detention at port of call, besides forty-eight hours for waiting for orders there. The charterers to have the option of keeping the said ship fifteen days on demurrage, over and above the said laying days, at 4*d.* p. reg. ton per day.

The master and owners to have an absolute lien on the cargo for the recovery and payment as above of all freight, dead freight, and demurrage.

It is hereby understood and agreed, anything in this agreement to the contrary notwithstanding, that the charterers and [or] their agents have power to advance on account of freight any money that they or their agents may consider necessary to relieve the ship from arrest, or generally, to prevent delay in the dispatch or due delivery at the port of discharge of the cargo; and the master's receipt for any money so advanced shall be conclusive and binding proof thereof, and of the necessity and propriety of the same, and the charterers shall be entitled to deduct the same from the freight at settlement, with interest at $7\frac{1}{2}$ per cent. per annum, and 5 per cent. commission and cost of insurance. All contributions to general average losses which may become payable in respect of any advances under this charter, shall be borne and paid by the owners, and if advanced and paid by the charterers may be similarly treated by them as a payment on account of freight.

Pursuant to the terms of the charterparty the ship proceeded to Port Ludlow, and there Messrs. Sproat & Co., who were the agents of the plaintiffs, caused to be shipped on board of her a

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cargo of spars. The master of the ship signed a bill of lading for the spars. The bill of lading was in substance as follows :

Shipped in good order and condition by Sproat & Co., as agents, on board the ship called the San Roman, whereof R. Martens is master, now lying at Port Ludlow, bound for Queenstown or Falmouth, for orders for a port of discharge.

[Spars, &c., describing the same.]

And are to be delivered in like order and condition, at a port within the limits mentioned in charterparty, as may be ordered at Queenstown or Falmouth (the dangers of the seas only excepted), unto Messrs. Anderson, Anderson, & Co., or to their assigns, he, or they, paying freight for the said cargo, as per charterparty, with average accustomed as per charterparty.

In witness whereof the master of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Port Ludlow, the 21st day of May, eighteen hundred and seventy.

587] *At the time the cargo was shipped Sproat & Co., had in their possession a copy of the charterparty which had been sent out to them by the plaintiffs. The goods mentioned in the bill of lading belonged to the plaintiffs. The bill of lading was afterwards delivered by Sproat & Co., to the plaintiffs.

The San Roman sailed from Port Ludlow on the 24th of May, 1870, with the said cargo on board, but damage sustained at sea constrained her to put into Valparaiso on the 26th of August, 1870. The necessary repairs were completed on the 23d of September, 1870, when the ship was ready for sea, but a war between the North German Confederation and France, which had broken out in July, 1870, and was then existing, and the fear of capture by French cruisers induced the masters of the ship to keep her in port at Valparaiso until the 15th of December. In the meantime the master had incurred expenses at Valparaiso which he was unable to pay and a delay of some days occurred in consequence of his having to obtain a loan on bottomry and having to submit certain average papers to agents at Valparaiso. On the 23d of December the San Roman proceeded on her voyage, and on the 16th day of April, 1871, she arrived at Queenstown and received orders to proceed to the Tyne. On the 26th day of April she arrived in the Tyne, and shortly afterwards finished the discharge of her cargo.

The plaintiffs in their petition alleged as follows :

5. The San Roman sailed from Port Ludlow with the said cargo on board, but her master, in violation of the terms of the said bill of lading, without any justifiable cause, deviated from the said agreed voyage, by putting, with the said vessel and cargo, into Valparaiso, and by for a long time remaining there, though not prevented by the said excepted dangers from prosecuting the said voyage to the port of Queenstown or Falmouth, according to the terms of the said bill of lading.

6. By reason of the premises the plaintiffs have incurred great loss on account of their being for a long time deprived of the said cargo, and have also been put to great expense in and about endeavoring to obtain possession of the same, and the said cargo has been greatly deteriorated and depreciated in value, and the plaintiffs have been otherwise greatly damaged and injured.

The answer of the defendants contained, *inter alia*, the following allegations :

4. A bill of lading of the said cargo, in the words and figures set out in article 3 of the petition, with a certain specification endorsed, was signed and delivered by R. Martens, who was then master of the San Roman ; the said master had not any authority from the defendants to sign a bill of lading in the said terms or not *containing the exceptions contained in the said charterparty, and the de [588 defendants never ratified his act in so doing.

5. On the 24th day of May, 1870, the San Roman, with the said cargo on board, sailed from Port Ludlow, and after putting into Mazatlan, in Mexico, on the 22d day of June, in order to land the said R. Martens, who was dangerously ill, proceeded upon her voyage under the command of E. Hacke—who succeeded the said R. Martens in the command of the said ship—until the 8th day of August, when it was discovered that serious injuries had been sustained by the rudder and rudder trunk of the said vessel from the gales and heavy seas which she encountered, being dangers of the seas within the intent of the said bill of lading, and thereby it became and was necessary for the safety of the ship and cargo to put into a port of refuge to repair the said damage, and the master of the San Roman, as was reasonable and prudent for him to do, and as he lawfully might and ought to have done, steered for Valparaiso as the nearest safe port, and arrived there on the 26th day of August, 1870. It is wholly untrue as alleged in the 5th article of the petition that the master of the said vessel, in violation of the terms of the said bill of lading, and without any justifiable cause, deviated from the said voyage by putting into Valparaiso.

6. Subsequently to the sailing of the San Roman from Port Ludlow, as aforesaid, and before her arrival at Valparaiso, war broke out and was declared between the Empire of France and the states of the said confederation, and such war continued until and was existing at the time of the arrival of the said vessel at Valparaiso, and thence until and at the time of the departure of the said vessel from Valparaiso, as hereinafter mentioned. By reason of such war the San Roman became and was liable to risk of capture. Upon the arrival of the San Roman at Valparaiso the said E. Hacke received for the first time information of the said war.

7. The said E. Hacke immediately upon his arrival at Valparaiso caused proper surveys to be made of the said damage, and the repairs found necessary were proceeded with and completed with all reasonable dispatch, and on or about the 23d day of September the said repairs were completed, and the vessel was ready for sea.

8. From the time when the San Roman put into Valparaiso, and thence until the completion of the said repairs, until the 12th day of December, 1870, French armed national cruisers were off the port of Valparaiso, and lying in the said port in readiness at any time to proceed to sea under sail or steam with the intention of capturing North German ships, and if the San Roman had during the time and under the circumstances aforesaid left Valparaiso, and attempted to proceed upon her voyage, she would almost certainly have been captured by some or one of the said cruisers, and there was no reasonable expectation that she would have escaped such capture.

9. On or about the 12th day of December, 1870, the last of the said French cruisers left Valparaiso and the offing, and the master of the San Roman immediately proceeded to make, with all reasonable dispatch, the necessary preparations for proceeding up in his voyage, and on the 23d day of the said month the said preparations were completed, and a reasonable and proper time having then elapsed since the said cruisers had sailed, so that it appeared that they were not in the neighborhood of the port of Valparaiso, or intending to return thereto, *the [589 San Roman on the said 23d day of December got under weigh and proceeded upon her voyage. It is wholly untrue, as alleged in the 5th article of the petition that the master of the said vessel, in violation of the terms of the said bill of lading, and without justifiable cause, remained a long time in Valparaiso ; on the contrary, the master of the San Roman, as soon as the aforesaid repairs were completed, was always ready and willing to proceed on the said voyage as soon as it was reasonable and prudent so to do, regard being had to the said liability to risk of capture.

11. By the law of the said city of Hamburg, and of the said North German Con

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federation, the master of the San Roman was entitled to keep the said vessel in Valparaiso whilst she would have been liable to risk of capture at sea by reason of the said war; and by such law the master of the said vessel whilst the said war and liability to risk of capture continued was not under any obligation to the plaintiffs to proceed or to attempt to proceed upon the said voyage with the San Roman; and by the said law the master of the said vessel has not been guilty of any breach of contract or duty with or to the plaintiffs by remaining in Valparaiso with the said cargo under the circumstances hereinbefore stated.

12. It is not the fact that the said cargo was deteriorated or depreciated by the said delay or otherwise, as alleged in article 6th of the petition, and the several allegations contained in the said article are untrue.

13. The said delay of the said vessel at Valparaiso, and the damages, if any, resulting to the said cargo and to the plaintiffs therefrom, were caused by the act of God, the queen's enemies, restraints of princes and rulers, and dangers and accidents of the seas, within the true intent and meaning of the said charterparty and bill of lading.

14. By the law of Hamburg and of the said confederation, the defendants are not liable to the plaintiffs in respect of any deterioration of the said cargo or losses of the plaintiffs, arising from the prolongation of the said voyage owing to the said war, and liability to risk of capture.

May 30. The cause came on for hearing and was continued on the 31st of May and the 3d and 4th of June. The depositions of witnesses examined at Valparaiso under a commission, with documents annexed, were put in, and witnesses were examined orally before the court. The evidence was principally directed to the issue raised by the eighth article of the answer. The result of the evidence on this point appears from the judgment. On behalf of the defendants, Dr. Julius Seebohm, a North German advocate, who had for many years practised in the courts of law at Hamburg, and had devoted particular attention to the study of mercantile law, was examined as to the German law affecting the questions raised in the case. He gave evidence to prove that according to North German law, assuming goods to be shipped under a bill of lading, such as the bill of lading in 590] the *present case, and that bill of lading to be the only contract between the shipowner and the owner of the goods, and the North German Confederation to be afterwards to be involved in war, it would be the duty of the master to avoid risk of capture, not only for the sake of the ship, but also for the sake of the goods, even though the goods should belong to neutral owners, and that the master would be justified in delaying the vessel and cargo in order to avoid capture, provided the risk of capture were a risk to which, in the judgment of a sensible man, it would be imprudent to expose the ship or goods.

He referred to the following articles of the North German Code, which he stated had been in force in Hamburg since 1866: 504, 505, 607, 631, 634, 636, 637, 642, 643, 644, 645, 653, 708, 735, 824, 827, 852, 853. (1) He also referred to two cases de-

(1) A translation of the North German 2d ed.: London, 1871. Several of the Mercantile Code is contained in "*Papers articles referred to are printed in the report of The Patria, ante, p. 448.*" E. E. Wendt,

cided in the Chief Commercial Court at Hamburg — the case of *The Gutenberg* and the case of *The Landwursten*.⁽¹⁾

Butt, Q.C., and *Cohen*, for the plaintiffs. The first question is whether English or German law is to be applied in this case. The intention of the parties must be regarded, and the following facts plainly show that it was intended that English law should govern. The charterers are English. The plaintiffs are English. The charterparty and the bill of lading are in the English language. The ports of call mentioned in the bill of lading are English. The measurement of the cargo is English measurement. The freight is stated to be payable in English currency. The enemies mentioned in the charterparty are the queen's enemies. But whether English or German law applies, the substantial question remains the same, namely, Was the delay at Valparaiso such as a reasonable man would have incurred under the circumstances? The evidence shows it was not. They cited *The Patria* ⁽²⁾; *The Heinrich* ⁽³⁾; *The Teutonia* ⁽⁴⁾; *Pole v. Celcovich* ⁽⁵⁾; The San *Roman was entitled to a [591] start of twenty-four hours, and she might easily have evaded the French cruisers.

Milward, Q.C., and *E. C. Clarkson*, for the defendants. The German law applies. The ship was German, her owners were German. The ship was in a foreign port when the charterparty was made; one copy of the charterparty was signed in Germany by the owners of the ship; and the port of discharge, according to the limits mentioned in the charterparty, need not have been English: *Lloyd v. Guibert* ⁽⁶⁾; *The Karnak* ⁽⁷⁾; *The Patria* ⁽⁸⁾. Assuming German law to apply, the facts proved clearly justify the delay, and show that the master was bound to remain at Valparaiso.

If the case is to be governed by the English law, still it is contended that the delay of the master was justifiable: *The Wilhelm Schmidt* ⁽⁹⁾. The delay was justifiable under general principles; but even if not so, it was justifiable by virtue of the terms of the charterparty. At the time the bill of lading was signed, all the parties had notice of the terms of the charterparty, and, under the circumstances, the charterparty, which contains the exception "queen's enemies," was the controlling instrument: *Parsons on Shipping*, vol. i., p. 287, ed. 1869; *Sandeman v. Scurr* ⁽¹⁰⁾. The rule of twenty-four hours' start would

⁽¹⁾ "Commercial Court Gazette," Hamburg, 25 Nov., 1871.

⁽²⁾ Ante, p. 436.

⁽³⁾ Ante, p. 424.

⁽⁴⁾ Ante, p. 394, at p. 415, Law Rep., 4 P. C. p., 171, at p. 179.

⁽⁵⁾ 9 C. B. (N. S.), 430; 30 L. J. (C. P.) 102.

⁽⁶⁾ Law Rep., 1 Q. B., 115.

⁽⁷⁾ Law Rep., 2 P. C., 505.

⁽⁸⁾ Ante, pp. 436, at p. 462.

⁽⁹⁾ 1 Asp.'s Mar. Law Cases, p. 82.

⁽¹⁰⁾ Law Rep., 2 Q. B., 86.

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not apply, under any circumstances, to prevent a cruiser outside the port of Valparaiso giving immediate chase to the San Roman; and though the rule would apply to a cruiser in the port of Valparaiso, there is nothing to show that the authorities there would have enforced the observance of the rule.

Butt, Q.C., in reply.

Cur. adv. vult.

June 25th. SIR ROBERT PHILLIMORE. This is a suit instituted under the 6th section of the Admiralty Court Act, 1861, by certain persons, as owners and consignees of the cargo, against the ship *San Roman*, a foreign vessel, for a breach of contract or duty in respect of the carriage of that cargo.

592] *The charterparty, dated the 13th of February, 1869, was made between the owners of the ship and certain English merchants and charterers, by which it was agreed in substance that the vessel, taking an outward cargo from Wales to Japan, should proceed to Vancouver's island and load a cargo of spars, and therewith proceed as charterers' agents might order, on signing bills of lading, either to a port of discharge direct, within the limits thereafter mentioned, or to Queenstown or Falmouth, for orders for a port of discharge within those limits. The master was to sign bills of lading without prejudice to the charterparty. The excepted perils were, "The act of God, the queen's enemies, restraints of princes and rulers," and others.

The bill of lading which the plaintiff pleads as being pursuant to the terms of the charterparty, was dated the 21st of May, 1870. It referred to the charterparty, but contained only one excepted peril, "the dangers of the seas." The plaintiffs charge that the contract was violated by deviation from the voyage, and by a delay not caused by the excepted dangers.

There has been in this case, as in the former cases growing out of the French and German war, a contention as to what law governs the rights of the parties.

In this case the ship was German, but the charterers were English, and the charterparty, dated at London, was executed while she lay in the port of Antwerp, at Hamburg and in England, in the English language. The bill of lading was in the same language, dated and delivered at Port Ludlow, in Vancouver's island. The only material difference between the two instruments for the purposes of this suit is, that the charterparty contains amongst its exceptions "The queen's enemies" and "restraints of princes and rulers," while in the bill of lading the language is, "the dangers of the seas only excepted;" but then, this instrument refers to the charterparty, and the charterparty provided that the master might "sign bills of lading for the cargo as required by charterers or their agents, but at not

less than the above chartered rate, without prejudice to this charterparty." I am of opinion that the contract is contained in both these instruments, but that the stipulation of the single exception in the latter does not supersede the stipulation as to the other exceptions stated *in the former instruments. [593] The port of call for orders and the port fixed for delivery were English.

With respect to the law applicable to these circumstances, I must observe that this is not a case in which the master would be contravening the law of his country by carrying the goods to their destination, but is a case in which, so far as that law is concerned, he might do so.

The question as to the reasonableness of the delay with reference to the excepted peril seems to me, as in the case of *The Wilhelm Schmidt* (¹), to be properly governed by the law of the place of performance; and this also appears to be the principle on which the Court of Hamburg decided the case of *The Landwoursten* (²). It has been argued that these opinions conflict with the decision in *Lloyd v. Guibert* (³). It is not, however, necessary to decide this point, or whether the case of *Lloyd v. Guibert* (³) be reconcilable with the decisions of the privy council in *The Hamburg* (⁴), because I agree with Mr. Butt. that upon this question of the reasonableness of delay there is really no substantial difference between the law of England and Germany. According to both, an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, would justify delay.

I must not omit to notice one argument addressed to me upon the hypothesis that this case is governed by the law of the flag—German law. That law, it is said, entitles the owner to charge a portion of the expenses incident to the delay on the principle of general average upon the shipper, and so the master is exposed to a strong temptation to remain in port during a war of this kind, certain on the one hand that the loss will only partially affect his employers, and on the other hand, that he will be the gainer by being employed a longer time, because if he reached the port of destination his employment would be at an end till the war was over.

I am not insensible to the force of this argument, but the only just effect of it must be to render the court vigilant in ascertaining *the character of the danger and the *bonâ* [594] *fides* of the excuse. I must also bear in mind that the German

(¹) 1 Asp.'s Mar. Cases, 82.

(³) Law Rep., 1 Q. B., 115.

(²) "*Commercial Court Gazette*,"
Hamburg, 25 Nov. 1871.

(⁴) 2 Moo. P. C. (N.S.), 239; Br. & L.,
253.

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law in this case does not, as was proved to me in this case, as also in that of *The Putrin* (1) forbid the master to run the risk of capture in fulfilling his engagements.

The San Roman sailed to Port Ludlow, there loaded a cargo of spars, and proceeded on her voyage to Queenstown. Damage sustained at sea constrained her to put into Valparaiso on the 26th of August. In the petition of the plaintiffs this putting into Valparaiso was charged as a breach of contract, but this charge, at the hearing, was abandoned, and the allegation of breach of contract is confined to the subsequent remaining at that port. She did not leave it before the 23d of December. The necessary repairs were completed on the 23d of September, when the ship was ready for sea.

It is the delay during this interval of time, namely, from the 23d day of September to the 23d of December, which the plaintiffs now allege as a breach of contract.

The delay is admitted. The defense set up is, that it was caused by the danger of capture from French cruisers, which rendered it unsafe to leave Valparaiso and which brought the delay within the exceptions in the charterparty as to the "queen's enemies."

It is admitted that there was a danger of the kind stated, but it is contended that it was not of the degree which warranted this long postponement of the execution of the contract. It was not of that pressing and imminent character which alone would justify such a delay. It was a danger rather in the nature of other perils by sea which it is the duty of the master to encounter.

The material evidence as to the delay appears to be as follows:

On the 2d of September the correspondents of the plaintiffs and consignees of the ship wrote this letter:

"Per steamer via Panama and Southampton.

"Valparaiso, 2d September, 1870.

'Messrs. Thos. Bilbe & Co., London.

"Gentlemen—At the request of Capt. E. Hacke commanding the North German 595] ship San Roman, chartered by you, we beg to advise you that said vessel has been obliged to put into this port in order to replace the rudder which has been broken at sea on her voyage to Europe:

"The repairs will be finished within a short time; but as Capt. E. Hacke has been warned by his consul not to proceed to sea as long as the vessels of his nation are exposed to capture by French men-of-war, he wishes to get instructions from you as to what to do in case of the war between Germany and France continuing at the receipt of the present.

"We shall be happy to be useful to you in the present, or in other matters, and remain,

"Gentlemen,

"Yours respectfully,

"L. Schutte & Co.

"Consignees of the North German ship San Roman.

"Edward Hacke, master."

(1) Ante, p. 426

To this the following answer was written :

" Messrs. L. Schutte & Co.
" Valparaiso.

" Per Messrs. Aug. Jos. Schon & Co.

" Hamburg,

" 19th of October, 1870.

" Gentlemen — Messrs. Thomas Bilbe & Co., have asked us as their agents to reply to your favor of 2d ulto., which reached them yesterday. We have first to point out to Capt. E. Hacke of the San Roman, that the mere dread of being captured is not a sufficient reason for his breaking the contract with the charterers, and while calling upon him as we now do to prosecute the voyage with all reasonable diligence, we have to give you notice that our principals will hold him or the owners of the ship liable for loss of market or other damages which they may sustain from the delay.

" Be kind enough to communicate this to Capt. Hacke.

" We are, &c.,

" Anderson, Anderson & Co.,

" Agents to Messrs. Thos. Bilbe & Co.,
" Rotherhithe."

This answer, however, did not arrive at Valparaiso till after the 23d of December, when the San Roman had sailed.

I must observe that in the letter of Messrs. Schutte there is, on the one hand, no suggestion that Captain Hacke was to blame or that his alleged reason for remaining in port was unsupported by fact, while on the other hand there is conclusive evidence that he was acting under the advice, indeed the admonition, of his consul, not to go to sea. And in the case of *The Teutonia* ⁽¹⁾, the privy council in affirming my judgment, held that if a neutral merchant put his goods on board a belligerent ship, " it cannot be contended *that the master is deprived of the [596 right of taking reasonable and prudent steps for the preservation of his ship, because from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship."

The following facts are clearly proved : That a French man of war, a store ship, was always in the port ; that there were several German ships in it, waiting there from the first days in August to the 15th of December, that during this period one only sailed, on the 5th of August, for Hamburg ; that no German vessel left Valparaiso between the 18th of August and the 15th of December, that up to the 13th of November French men-of-war were in and out of the port, that after this time, according to the registers of the Commercial Exchange at Valparaiso, it was impossible to discover the destinations of the French ships, which " were kept strictly secret ;" but that it appeared on that registry that they were cruising (*para cruzar*) ; that there had been captures made off Peru or Chili ; that even after the 12th of December, French ships were reported to be

(1) Law Rep., 4 P. C., 171, at p., 180.

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in Peruvian waters; that after the news of the German victories arrived, the first German vessel left Valparaiso on the 15th of December.

I think it is also proved that between the 15th of December and the 23d, when the San Roman left Valparaiso, the captain was guilty of no unnecessary delay with respect either to the bottomry bond, or to obtaining the average papers necessary for the protection of his employer, and that even then his crew at first refused to go to sea, through fear of capture.

It has been urged that in spite of the French cruisers, the San Roman having liberty of twenty-four hours' start, might have steamed out of the reach of the French cruisers. But the evidence satisfies me that this course would have exposed the ship to a very probable risk of capture. There were French cruisers without the port, and a stationary French store ship within; some communication was doubtless kept up between them — the evidence shows that the preparations of the San Roman to be ready for sea would in all probability have made known her intention, and the evidence as to the usual state of the wind off that coast does not in my judgment add any circumstance which would favor the escape from French cruisers, but the contrary.

597] *However this may be, I think the defendant has on the whole established his defense, that he only exercised his right of taking reasonable and prudent steps for the preservation of his ship, in refusing, under the advice of his consul, and in all the circumstances of the case, to sail before the 23d of December, and I dismiss this suit with costs.

Solicitors for plaintiffs: *Thomas & Hollams.*

Solicitors for defendants: *Ingledeu, Ince & Greening.*

[Law Reports, 3 Admiralty and Ecclesiastical, 597.]

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Delay in order to avoid the Risk of Capture—Refusal of Master to Tranship.

A charterparty, written in the English language, but entered into at Constantinople between freighters who were subjects of the North German Confederation, resident there, and the master of a North German vessel owned by subjects of the North German Confederation, provided that the vessel should proceed to Taganrog, and there take on board a cargo as therein mentioned, to be carried to Queens-town, Falmouth, or Plymouth for orders, and thence to a safe port in the United Kingdom, or a safe port on the continent between Havre and Hamburg, both inclusive, or as near thereunto as he could safely get, and deliver the same on being paid freight as therein mentioned, the act of God, the queen's enemies, re-

straint of princes and rulers, among other perils therein mentioned, excepted. In pursuance of the terms of the charterparty the vessel proceeded to Taganrog, and a cargo, as agreed, having been shipped on board, bills of lading were signed by the master of the vessel, under which the cargo was to be delivered at a safe port in the United Kingdom or on the continent, as per charterparty, the act of God and the queen's enemies excepted. On the 29th of June, 1870, the vessel sailed on her voyage with the cargo to Falmouth one of the ports of call mentioned in the charterparty, and on the 16th of August put into Algeiras in order to obtain a supply of water. She there learnt, as the fact was, that since she had sailed from Taganrog a war had broken out between France and the North German Confederation, and was still existing. In order to avoid capture by the French cruisers the vessel proceeded to Gibraltar, where she arrived on the 15th of August, and remained there with her cargo on board till the 2d of February, 1871, when, after receiving news that an armistice had been concluded between France and the North German Confederation, she sailed for Falmouth and delivered her cargo, according to orders, in London. Whilst the vessel was lying at Gibraltar her master was requested by the owners of cargo to proceed on his voyage, and if he would not do so, then to tranship and forward the cargo to its destination at the expense of his owners, but no tender of freight and expenses was made, such as according to German law was necessary to entitle the owners of the cargo to demand its transhipment. The war continued until January, 1871, and *if [598 the vessel had left Gibraltar during the war she would have run great risk of capture from French cruisers :

Held, that under the circumstances the master was justified in proceeding with his ship to Gibraltar, and keeping her there with her cargo on board during the continuance of the war.

Seemle, the law to be applied to the execution of the contract was North German law.

This was a cause instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of Messrs. Scaramanga & Co., of London, owners and consignees of cargo laden on board the North German vessel Express, against the said vessel and her freight, and against her owners intervening as defendants.

The following are the material parts of the petition :

1. The Express is a foreign vessel, of which no owner or part owner was at the time of the institution of this cause domiciled in England or Wales.

2. In or about the month of June, 1870, whilst the Express was lying in the port of Taganrog, the plaintiffs caused to be shipped on board of her a cargo of rye of the plaintiffs, and the master of the said vessel accepted the same to be carried in the said ship from Taganrog aforesaid to Queenstown, Falmouth, or Plymouth for orders, and thence to a port as ordered, under and according to the terms of a certain bill of lading duly signed and delivered by the said master, according to which bill of lading the said goods were to be delivered in the like good order and condition as they were shipped in, at a safe afloat port in the United Kingdom or on the continent, as per a certain charterparty (the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted) unto the plaintiffs of London, or to their assigns, paying freight, gratuity, and demurrage (if any) for the said goods, and other conditions as per charterparty.

3. The Express duly sailed on her said voyage with the said cargo on board, and in course of the said voyage, without any justifiable cause or excuse, put into the port of Gibraltar. After the said vessel had so put into the said port of Gibraltar, and whilst she was lying there, her master was requested by the plaintiffs to proceed on the aforementioned voyage, and if he would not do so, then to tranship and forward the said cargo.

4. The said master, however, declined to comply with such request, and remained at Gibraltar with his said vessel and the said cargo on board of her for a very considerable time.

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5. By reason of the premises the said master wrongfully and without justifiable cause, in violation of the terms of the said bill of lading, deviated from and delayed proceeding on the voyage in the said bill of lading mentioned.

6. The plaintiffs were and are the owners of the said cargo, and the holders of the said bill of lading.

7. By reason of the premises the said cargo became and was greatly heated, damaged, and depreciated, and the said cargo was delivered to the plaintiffs in a much worse order and condition than it was shipped in, this not being occasioned by any of the perils, causes, or matters in the said bill of lading excepted, and 599] *thereby the plaintiffs have sustained great loss, and have been deprived of divers profits which they otherwise would have derived from the said cargo.

The proctors for the defendants, in their answer, alleged as follows:

1. In the month of May, 1870, the Express, which then was and ever since has been, and still is, a vessel sailing under the flag of the North German Confederation, and belonging to the port of Rostock, in the Duchy of Mecklenburg, one of the states of the said confederation, and owned by persons being subjects of the said confederation, was lying in the port of Constantinople, and on the third day of the said month of May a charterparty was made and entered into between Wilhelm Fretwurst, the master of the Express, and Messrs. Schjott and Reppen, merchants, of Constantinople, and subjects of the said confederation. By such charterparty it was agreed that the Express, under the German flag, should proceed to a loading place in the Azov as ordered at Berdianski, and there load from the factors of the freighter a full and complete cargo of tallow, wheat, Indian corn, seed, or other stowage goods at the option of the freighter; and being so loaded should therewith proceed to a safe port in the United Kingdom, or a safe port on the continent between Havre and Hamburg, both inclusive, or so near thereunto as she might safely get, calling at Queenstown, Falmouth, or Plymouth, at the master's option, and deliver the said cargo on being paid freight, as therein mentioned, the act of God, the queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation always excepted.

2. In pursuance of the terms of the said charterparty, the Express proceeded to Taganrog, which was the loading port in the sea of Azov, for which she received orders at Berdianski, and the plaintiffs, who were the factors of the freighters within the meaning of the said charterparty, caused to be shipped upon the Express, at Taganrog, a cargo of rye in bulk, and the master of the Express signed and delivered to the plaintiffs a bill of lading in respect of the said cargo, in the words and figures following, that is to say:

"Shipped in very good condition and order by Messrs. Scaramanga & Co., for account and risk of whom it may concern in and upon the good ship called the Express, North German flag, whereof is master for this present voyage Wm. Fretwurst and now riding at anchor in the port of Taganrog, and bound for Queenstown, Falmouth, or Plymouth, for orders, rye in bulk, say two thousand four hundred and ninety-seven chetwerts, being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at a safe afloat port in the United Kingdom, or on the continent, as per charterparty (the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted) unto Messrs Scaramanga & Co., of London, or to their assigns, paying freight, gratuity, and demurrage (if any) for the said goods, and all other conditions as per charterparty stipulated in Constantinople the 3d of May, 1870, with primeage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date, the one of which three bills being accomplished, the other two to stand void.

"Dated in Taganrog, 15-27th June, 1870.

"Qualität und quantität unbekannt.

"Wm. Fretwurst.

pp. Scaramanga & Co.
D. Manousey."

*3. On the 29th day of June, 1870, the Express set sail from Taganrog [600 with the said cargo, and proceeded on her voyage, and on the 16th day of August, 1870, cast anchor off Algeſiras, with the intention of filling up her water casks, strong winds from the north-westward having for some days prevented, and still continuing to prevent, her from working through the straits of Gibraltar.

4. After the sailing of the said ship from Taganrog, and before she anchored off Algeſiras as aforesaid, war broke out and was declared between the Empire of France and the states of the said confederation, and such war continued to exist down to and existed at the time when the Express anchored off Algeſiras as aforesaid, and by reason of such war the Express became and was liable to risk of capture.

5. Upon arriving at Algeſiras as aforesaid, the master of the Express was informed of the outbreak and existence of the said war, and learned that it would be dangerous for the Express to proceed upon her voyage, owing to the risk of her being captured by French cruisers at sea, and on the 18th day of August, 1870, the master of the Express, as he lawfully might do under and by virtue of the laws of Mecklenburg, and of the said confederation, and as was reasonable and proper for him to do under the circumstances herein set forth, sailed with the Express from Algeſiras, and proceeded to, and on the same day arrived in, the roadstead of Gibraltar, which was a safer and more sheltered roadstead than that of Algeſiras. It is not the fact that the master of the Express without justifiable cause and excuse, or wrongfully or in violation of the terms of the said bill of lading, put into the port of Gibraltar, as alleged in the 3d and 5th articles of the petition.

6. On the 30th day of January, 1871, the master of the Express received information that an armistice had been concluded between France and the said states of the North German Confederation, and thereupon immediately began to prepare the Express to proceed upon her voyage, and on the 2d day of February, 1871, the news of an armistice having been confirmed, and the necessary preparations completed, the Express set sail from Gibraltar to complete her voyage.

7. From the time of the arrival of the Express at Algeſiras, until the 30th day of January, 1871, the said war continued to exist, and during all such time, the Express would have been liable to risk of capture if she had attempted to proceed on her voyage, and during all such time French armed national cruisers were cruising off the straits of Gibraltar, and in the Atlantic ocean, and in the English channel, and off the ports of Cork, Falmouth, and Plymouth, with the intention of capturing the Express, and other North German vessels; and if the Express had during the time aforesaid attempted to proceed on her voyage, she would almost certainly have been captured by some or one of such cruisers.

8. It is not the fact that the master of the Express unjustifiably, or in violation of the said bill of lading, delayed proceeding on his voyage as alleged in article 5 of the said petition. On the contrary, the said master was always ready and desirous to proceed from Gibraltar as soon as he could do so without being exposed to risk of capture.

9. By the law of the said North German Confederation, the master of the Express was entitled to keep her at Gibraltar whilst she would have been liable to risk of capture at sea by reason of the said war, and the said master was not, whilst the said war and liability to risk of capture continued, under any obligation to attempt to proceed further upon his said voyage; and, by the said law, [601 the master of the Express was not guilty of any breach of contract or duty with or to the plaintiffs in respect of his putting into Gibraltar or remaining there with the Express with the said cargo on board of her, or in respect of not transhipping the said cargo.

10. The master of the Express sailed from Gibraltar with the Express, within a reasonable and proper time after receiving notice of the termination of the risk of capture by reason of the said war.

11. On the 17th day of February, 1871, the Express arrived in Falmouth harbor, and her master, having duly given notice of his arrival to the charterers' agents in London, on the 20th day of the said month received orders to proceed to London, and on the same day the Express left Falmouth, and on the 26th day of February, 1871, arrived in London.

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12. On the 28th day of the said month of February, the discharge of the cargo was commenced; and on the 2d day of March, 1871, such discharge was completed.

13. It is not the fact that the cargo of the Express was delivered in a worse order and condition than it was in when shipped.

14. If the said cargo was delivered in worse order and condition than it was when shipped, the deterioration was caused by the detention of the Express at Gibraltar, as hereinbefore mentioned, which is an exceptive peril within the true intent and meaning of the exception of "the queen's enemies" contained in the said bill of lading, and by the natural condition and inherent vice of the said cargo, or by one of such cases.

15. Whilst the said vessel was detained at Algeiras and Gibraltar, as aforesaid, the master of the Express used all due and proper and reasonable care and skill in ventilating, trimming, and otherwise caring for the safety, order and condition of the said cargo, and did all things on his part to be done in taking care of the same, and any deterioration or depreciation of the said cargo was not caused by any neglect or default of the said master, but was caused by the detention of the said vessel as aforesaid, or by the natural condition and inherent vice of the said cargo, or by both such causes, and by the law of the said North German Confederation, regard being had to the terms of the said bill of lading and charter-party, neither the Express, nor her owners, nor the said master, is or are liable to damages in respect of the depreciation or deterioration of the said cargo.

16. Save as herein appears, the defendants deny the truth of the several allegations contained in the said petition.

The plaintiff's solicitors in their reply pleaded that all the several averments, both as to law and as to fact in the answer, save such as were stated or admitted in the petition, were untrue; that all the several averments stated in the 5th, 7th, 8th, 9th, and 15th articles of the answer were immaterial and irrelevant; and that by the law of Mecklenburg and the North German Confederation the master of the Express was not justified in doing what was complained of in the petition.

602] *May 31. The cause came on for hearing; the hearing was continued on the 3d, 4th, and 6th of June. Witnesses were examined orally before the court on behalf of the plaintiffs and the defendants, and the depositions of witnesses examined under a commission at Gibraltar were put in. The allegations contained in the 1st, 2d, 4th, and 6th articles of the petition, and in the 1st, 2d, 3d, 4th, 6th, 11th, and 12th articles of the answer were substantially proved. The following facts were also proved: The master of the Express upon arriving at Algeiras was informed of the outbreak of the war, and received from the North German consul at Gibraltar, on the 18th of August, a letter which was in substance as follows: ⁽¹⁾

Having been informed that you have called in at Algeiras on account of want of water, and that you intend proceeding on your voyage, I have written to the vice-consul of that place that he should give you contrary advice on account of

(1) This letter was tendered in evidence on behalf of the defendants, together with another letter to the master of the Express, from a German ship captain. The plaintiffs objected to the admission of the letters. The court admitted the letter of the consul, as it was a communication from an official person, but refused to admit the other letter.

the existing war between France and Germany, as I consider that you would incur risk if you proceeded to sea, as it is said that the French men-of-war have captured amongst others the barks *Brilliant*, Captain Zeissig, and *Perle*, Captain Wallis. In our bay are lying at anchor several German vessels.

On the 18th of August the *Express* sailed for Gibraltar, and arrived there the same day. The war continued to exist until January, 1871, and the master of the *Express* remained at Gibraltar, with his vessel, and with the said cargo on board of her, until the 2d of February, 1871, when he proceeded on his voyage as alleged in the 6th article of the answer. The agents of the plaintiffs at Gibraltar, shortly after the arrival of the *Express* at that port, requested the master of the *Express* to proceed on his voyage without delay, and on his refusing to do so protested against him for improperly delaying the voyage. Negotiations also took place with reference to the transshipment of the cargo into another vessel, in order that it might be forwarded to England. The result of the evidence with reference to these negotiations appears from the judgment.

It was proved that whilst the *Express* was lying at Gibraltar, *and during the month of August, 1870, and from that [603 time up to the commencement of the armistice mentioned in the sixth article of the answer, French national vessels were cruising in the English channel and elsewhere off the coast of England, and German vessels were exposed to risk of capture, though the evidence was conflicting as to the extent of the risk. The result of the evidence on this point appears from the judgment.

It was agreed that the evidence given in the cause of *The San Roman*, as to the German law should be admitted as evidence in this cause, but Dr. Seebohm, the expert examined in that case, was called on the part of the defendants as a witness in this case, and gave additional evidence, the substance of which is as follows :

By German law the master of a German vessel laden with a neutral cargo and detained at a neutral port by a reasonable fear of capture, is justified in remaining there even in opposition to the expressed wish of the owner of the cargo. The owner of the cargo is entitled to demand and receive his cargo at the place of detention, provided he pays distance freight and such share of the expenses of detention as is properly chargeable against the cargo, but on no other terms.

The witness referred specially to the 634th article of the German Mercantile Code. The substance of this article is printed in the case of *The Patria*, ante, p. 449.

Butt, Q.C., and *Cohen*, for the plaintiffs. This case, in most of its circumstances, is analogous to the case of the *San Roman* but differs from it in one point, The master of the *Express* re-

(1) Ante, p. 588.

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ceived orders from the plaintiffs to proceed on his voyage, but he not only refused to do this, but declined to entertain any reasonable offer for the transshipment of the cargo. For the reasons stated in the argument in the *San Roman* it is contended English law is the law which must govern the contract; and according to English law the conduct of the master in detaining the cargo for so long a time, and refusing to enter into arrangements for its transshipment, was wholly unjustifiable. Nothing short of an actual operative restraint could excuse the delay: *Atkinson v. Ritchie*.⁽¹⁾ Even if German law is to be applied to the contract, the master was not justified in demanding more freight than distance freight, yet he refused to deliver up the cargo at Gibraltar, except upon payment of full freight.

604] **Milward*, Q.C., and *E. C. Clarkson*, for the defendants. This case, equally with that of the *San Roman*, must be decided according to principles laid down by the law of Germany, the law of the flag. Not only is the ship German, but her master is a German, her charterers are Germans, and a portion of the bill of lading is in German. As to the alleged refusal of the master to receive distance freight, no offer as required by article 634 of the North German Mercantile Code was ever made to him, and until such offer was made he was not bound to deliver up the cargo.

Bull, Q.C., in reply.

Cur. adv. vult.

June 25th. SIR ROBERT PHILLIMORE: This is a suit instituted under the 6th section of the Admiralty Court Act, 1861, by Messrs. Scaramanga & Co., merchants, owners of the cargo laden on board the *Express*, and holders of the bill of lading, against the foreign vessel *Express* for a breach of contract or duty in respect of the carriage of that cargo. In the month of May, 1870, a charterparty was entered into between the master of the *Express* and certain merchants of Constantinople. In pursuance of this charterparty the *Express* sailed to Taganrog, and took on board a cargo of rye upon the terms of a bill of lading which was as follows: [The learned judge here read the bill of lading.]

In this case the ship was German, her master was German, she was lying at Constantinople, her charterers were German. her charterparty was in English, the bill of lading was in English with a proviso in German. She took on board her cargo at Taganrog, her charterparty provided for a delivery at a safe port in the United Kingdom or on the continent between Havre and Hamburg. Her port of call in fact was Falmouth.

I think in these circumstances the law to be applied to the execution of the contract is German; though in this, as in the

(¹) 10 East., 530.

case of the *Sun Roman*, with the exception of the question of transhipment, the principles of the English and of the German law would be pretty much the same. On the 30th of June, 1870, the Express sailed from Taganrog. On the 16th of August she anchored off Algeiras; there she was informed of the war which had broken out between France and Germany; 2d, on the 18th of *August she arrived at Gibraltar. On the 30th of [605 January, 1871, the news of the armistice reached her. On the 2d of February she left Gibraltar. On the 17th she arrived at Falmouth; there she received orders to go to London, where she arrived on the 26th. On the 28th she began to discharge her cargo; and on the 2d of March the discharge was completed.

The questions to be determined by the court are: 1st. Whether the master was justified in putting into Gibraltar? 2d. Whether he was justified in remaining there? 3d. Whether he was bound to tranship and forward the cargo? The burden of proving the affirmative of the two first propositions, and the negative of the third lies upon the defendants.

I am of opinion that the fair result of the evidence is that the Express would have run great risk of capture, if she had left Gibraltar at an earlier period than she did leave it. I do not assent to the proposition that if the chances of capture and escape were equal the master was bound to proceed; but I think the former preponderated: It was contended that there must be what was called "an actual operative restraint." This would seem to indicate that nothing short of a blockade would justify the delay of the vessel to sail. I am not of this opinion. I think a reasonable prudent man, exercising due discretion and fortitude, would not have sailed, thereby exposing his ship to capture at that time. I am of opinion that the master was justified in putting into Gibraltar, and remaining there till the 2d of February.

The question as to his duty to tranship remains to be considered. This is a duty which I may observe is set forth in the plaintiff's petition, but which only could arise under the German law. [The learned judge here read article 634 of the German Mercantile Code (1)]. The most important evidence upon this point appears to me to be contained in the correspondence between Messrs. Scaramanga & Co. and their agents Mosley & Co. at Gibraltar. The first letter is from Mosley & Co. on the 17th of August, in which they announce the arrival of the Express at Algeiras, and say that the writer has had an interview with the Prussian consul at Gibraltar who told him "that he was going to take upon himself to *order the captain (through [606 the Prussian vice consul at Algeiras) not to proceed."

(1) This article will be found printed in the case of *The Patria*, ante p. 449.

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The answer to this is in these words: "In reply to this we beg to say that the captain is bound to proceed, but if he desires to tranship cargo at his risk and expense for the United Kingdom or continent, for orders or for Amsterdam direct, we are willing to allow him to do so by first class vessel or steamer." On the 26th Mosley & Co. write that the captain says, "he cannot proceed because there being at a short distance from this port French privateers, he would expose both the vessel and cargo: and that unless the whole freight was paid to him and under the due formalities with reference to his charterparty, he would not tranship cargo under so unfavorable conditions as proposed by you." On the 3d of September they write that having remonstrated with the captain for asking whole freight he said he was prepared to make an equitable deduction, "200*l.* out of 750*l.* but they said they had no authority to enter into any arrangement of this kind." On the 10th of September Scaramanga & Co. write, that if the captain would pay the charge of transshipping to Amsterdam or Rotterdam, "we should be disposed to accept Gibraltar as port of discharge, and pay balance of freight due to him."

On the 12th of September, the captain, through his agent, apprises Mosley & Co. that "he will resume his voyage so soon as he can do so in safety." On the 17th the cargo is surveyed, and declared to be in "a most excellent condition."

On the 24th, Mosley & Co. write that they cannot find a sailing vessel for the purpose of transshipment; they add: "We had an interview with the captain, and endeavored to persuade him to accept what you propose. He told us the only thing he could do is to make a deduction of 125*l.* from the total freight," and added that he was more liberal than another German captain had been in the like circumstances.

On the 30th of September, Messrs. Scaramanga & Co. write that they are "not disposed to modify" their proposition. On the 21st of October the captain wrote to Mosley & Co. that the cargo was becoming "warm," and that he wished to know whether he was to take steps for preserving it, or whether they "would be inclined to tranship the cargo into another vessel 607] here against a reasonable *reduction of freight." Mosley & Co. replied that they had no other offer to make than that which they had already proposed. They informed Scaramanga & Co. that they had made this reply. On the 4th of November Scaramanga & Co. wrote that the captain's letters "did not call for any special reply, as he makes no definite proposal therein," and said that by making no offer themselves they would "probably be in a better position ultimately to deal with him for the loss arising out of his unwarrantable conduct in re-

 Regulations for Preventing Collisions at Sea.

maining in port." On the 24th of November they wrote that they should be willing to entertain any proposal emanating from the captain. On the 4th of February Mosley & Co. wrote that the captain had sailed; and on the 11th that "all the Germans that were lying here have now disappeared."

I am of opinion that the only definite proposal made by Scaramanga & Co. to the captain was that he should tranship at his own cost and expenses; and that they were not authorized by the German code to make such a demand.

I therefore pronounce that the defense is successful, both upon the ground of the deviation and delay being caused by a reasonable apprehension of capture, and upon the ground that no legal demand in the sense of the article of the code for transhipment was made to the captain.

I dismiss the suit with costs.

Solicitors for plaintiffs: *Thomas & Hollams.*

Proctors for defendants: *Clarkson, Son, & Greewell.*

*REGULÆ GENERALES. [609

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

ORDER IN COUNCIL respecting the application of Articles 11 and 13 of the Regulations as to two Ships meeting each other End On or nearly End On.

This Order appears in the "London Gazette" of the 4th August, 1868.

At the Court at Osborne House, Isle of Wight, the 30th day of July, 1868.

Present: The QUEEN's most Excellent Majesty in Council.

WHEREAS by "The Merchant Shipping Act Amendment Act, 1862," it was enacted, that on and after the first day of June one thousand eight hundred and sixty-three, or such later day as might be fixed for the purpose by order in council, the regulations contained in the table marked C. in the schedule to the said act should come into operation and be of the same force as if they were enacted in the body of the said act; but that Her Majesty might from time to time, on the joint recommendation of the admiralty and the board of trade, by order in council annul or modify any of the said regulations, or make new regulations in addition thereto or in substitution therefor, and that any alterations in or additions to such regulations made in

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manner aforesaid should be of the same force as the regulations in the said schedule :

610] *And whereas by the same act it was further provided that whenever it should be made to appear to Her Majesty that the government of any foreign country is willing that the regulations for preventing collision contained in table C. in the schedule to the said act, or such other regulations for preventing collision as are for the time being in force under the said act, should apply to the ships of such country when beyond the limits of British jurisdiction, Her Majesty might by order in council direct that such regulations shall apply to the ships of the said foreign country whether within British jurisdiction or not ; and it was further provided by the said act that whenever an order in council had been issued applying any regulation made by or in pursuance of the said act to the ships of any foreign country, such ships should in all cases arising in any British court be deemed to be subject to such regulation, and should for the purpose of such regulation be treated as if they were British ships :

And whereas by an order in council made in pursuance of the said recited act, and dated the ninth day of January one thousand eight hundred and sixty-three, Her Majesty was pleased to direct :

First, that the regulations contained in the schedule to the said act should be modified by the substitution for such regulations of certain regulations appended to the said order :

Secondly, that the said regulations appended to the said order should on and after the first day of June one thousand eight hundred and sixty-three apply to French ships whether within British jurisdiction or not :

And whereas by several orders in council subsequently made Her Majesty has been pleased to direct that the Regulations appended to the said order of the ninth of January one thousand eight hundred and sixty-three shall apply to ships of the following countries, whether within British jurisdiction or not ; that is to say,

Austria, Argentine Republic, Belgium, Brazil, Bremen, Chili, Denmark Proper, Equator (Republic of the), France, Great **611]** Britain, *Greece, Hamburg, Hanover, Hawaiian Islands, Hayti, Italy, Lubeck, Mecklenburg-Schewerin, Morocco, Netherlands, Norway, Oldenburg, Peru, Portugal, Prussia, Roman States, Russia, Schleswig, Spain, Sweden, Turkey, United States, Sea-going Ships, United States, Inland Waters, Uruguay.

And whereas Articles 11 & 13 of the said Regulations appended to the said recited order of the ninth of January one

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thousand eight hundred and sixty-three are as follows; that is to say,

Article 11.—“If two sailing ships are meeting end on or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.”

Article 13.—“If two ships under steam are meeting end on or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.”

And whereas there has been doubt or misapprehension concerning the effect of the said two articles:

And whereas the admiralty and the board of trade have jointly recommended to Her Majesty to make the following additions to the said regulations for the purpose of explaining the said recited articles, and of removing the said doubt and misapprehension:

Now, therefore, Her Majesty, by virtue of the powers vested in her by the said recited act, and by and with the advice of her privy council, is pleased to make the following additions to said regulations by way of explanation of the said two recited articles; that is to say,

The said two articles, numbered 11 and 13 respectively, only apply to cases where ships are meeting end on or nearly end on in such a manner as to involve risk of collision. They consequently *do not apply to two ships which must, if both [612 keep on their respective courses, pass clear of each other.

The only cases in which the said two articles apply are when each of the two ships is end on or nearly end on to the other; in other words, to cases in which by day each ship sees the masts of the other in a line or nearly in a line with her own; and by night to cases in which each ship is in such a position as to see both the side lights of the other.

The said two articles do not apply by day to cases in which a ship sees another ahead crossing her own course; or by night to cases where the red light of one ship is opposed to the red light of the other; or where the green light of one ship is opposed to the green light of the other; or where a red light without a green light, or a green light without a red light, is seen ahead or where both green and red lights are seen any where but ahead.

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ADDITIONAL RULES FOR THE HIGH COURT OF ADMIRALTY OF ENGLAND. WITH FORM OF RELEASE.

Approved and Confirmed by the Queen in Council, 24th March, 1871.

At the Court at Windsor, the 24th day of March, 1871.

Present: The QUEEN's most Excellent Majesty in council.

Whereas the judge of the High Court of Admiralty has, in pursuance of the provisions of an act passed in the session of parliament held in the third and fourth years of Her Majesty's reign, entitled (cap. 65) "An act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England," made and submitted certain additional rules for the said court, together with a form thereto annexed: And whereas the same have been this day laid before Her Majesty in council: 613] *Now, therefore, Her Majesty, having taken the said additional rules and form into consideration, was pleased, by and with the advice of her privy council, to approve and confirm the same; and the said additional rules and form (a copy whereof is hereunto annexed) are hereby approved and confirmed accordingly. And Her Majesty was further pleased to direct that the said additional rules and form shall be additional rules and form for the said High Court of Admiralty accordingly.

Whereof the judge, registrar, and other officers of the said court, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Signed)

ARTHUR HELPS.

The Right Honorable Sir ROBERT JOSEPH PHILLIMORE, Knight, the judge of the High Court of Admiralty of England, doth hereby, in pursuance of the provisions of an act passed in the session of parliament held in the third and fourth years of Her Majesty's reign, entitled (cap. 65) "an act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England," and subject to the approval of Her Majesty in council, make the following rules for the said court:

I. The following rules of the Rules, Orders, and regulations established by Her Majesty's order in council of the 29th of November, 1859, are hereby repealed, viz., Rules 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, 33 and 34.

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II. If the property to be arrested be situate within the Port of London, the warrant shall be executed by the marshal.

III. If the property to be arrested be situate elsewhere than in the Port of London, the warrant shall be executed either by the marshal or by the collector of the customs for the district within which the property happens to be.

*IV. If within twelve days after service of a warrant or [614 citation no appearance shall have been entered in the cause, the proctor for the plaintiff may file his petition. And if within twelve days from the filing of the petition no appearance shall have been entered, the plaintiff's proctor may, on bringing in his proofs, set the cause down for hearing.

V. If, when the cause comes before the judge, he is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim with or without a reference to the registrar or to the registrar assisted by merchants, and may at the same time order the property to be appraised and sold, with or without previous notice, and the proceeds to be paid into court, or may make such order in the premises as to him shall seem just.

VI. The forms annexed to the Rules, Orders, and Regulations established by Her Majesty's order in council of the 29th of November, 1859, and which are numbered as follows, are hereby repealed, viz., Forms Nos. 6, 7, 8, 9, 10, and 30; and the form annexed to these additional rules shall be substituted for form No. 30.

VII. These additional rules shall come into operation on the 1st April, 1871, if the same shall have been previously approved by Her Majesty in council, and if not, from the day on which they shall be so approved, and shall apply to all causes instituted on or after that date.

ROBERT J. PHILLIMORE,
Judge of the High Court of Admiralty.

14th March, 1871.

*Release.

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In the High Court of Admiralty of England.

No.	Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the Marshal of the High Court of Our Admiralty of England, and to all and singular his Substitutes, Greeting. Whereas in a cause of instituted in our said court on behalf of against , We did command
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you to arrest the said. and to keep the same under safe arrest until you should receive further orders from us. Now we do hereby command you to release the said from the arrest effected by virtue of our warrant in the said cause, upon payment being made to you of all costs, charges, and expenses attending the care and custody of the property whilst under arrest in that cause.

Given at London, under the seal of our said court, the
day of in the year of our Lord one thousand eight hundred and

Release

Taken out by

E. F.,
Registrar.

IN THE
COURT FOR THE HEARING
OF
PROBATE, MATRIMONIAL AND DIVORCE
CAUSES.

[Law Reports, 3 Probate and Divorce, 411].

June 4, 1872.

*COVELL v. COVELL.

[411]

Judicial Separation — Permanent Alimony — Petition after Decree made — Practice.

The Court for Divorce, acting upon the principles and rules in operation formerly in the Ecclesiastical Courts, will allow a petition for permanent alimony to be filed after it has made a final decree for judicial separation.

THIS was originally a suit for dissolution of marriage, brought by Rosa Elizabeth Covell against her husband Alfred Covell, by reason of his adultery and cruelty. The respondent denied the charges, and the matter came on before the judge ordinary on the 2d of February, 1872 when he decreed a judicial separation between the parties by reason of the adultery of the respondent, and that the children of the marriage should remain in the custody of the petitioner until further order. On the 6th of May, 1872, the petitioner presented a petition for permanent alimony; no application having been made by her for alimony pending suit. In this petition she alleged that the respondent is entitled to a moiety of four freehold houses, which produce to him a rental of 55*l.* per annum, and to 7000*l.*, and that he is carrying on the business of a butcher in America. On the 11th of May, 1872, an order was made for substituted service of the petition for alimony on William Saxby Covell, brother of the respondent; this service *was effected on [412 the 16th of May, 1872, and on the 23d of May an appearance was entered on behalf of the respondent under protest. On the 30th of May notice was given to the respondent that on the 4th of June the petitioner would move the court to decree to her such sum or sums of money, by way of permanent alimony, as to the court may seem meet.

June 4. *G. Browne*, for the respondent, objected to the motion being heard. No petition for alimony was presented

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Covell v. Covell.

during the pendency of the cause. By the final decree the parties are discharged from the suit, whether in a suit of dissolution of marriage or judicial separation. Applications can only be made after the final decree when authorized specially by the statute, as in the cases of the custody of children, and the alteration of settlements. [He referred to *Vicars v. Vicars* ⁽¹⁾; *Winstone v. Winstone and Dyne*. ⁽²⁾]

Dr. Tristram, for the petitioner. This is a matter which is governed by 20 & 21 Vict. c. 85, s. 22, which authorizes the court to act upon the principles and rules of the Ecclesiastical Courts in proceedings other than those to dissolve a marriage. There is no doubt that in suits for divorce *à mensâ et thoro* applications for permanent alimony were made after the final decree. The cases referred to on the other side were in suits for dissolution of marriage. [He cited *Westmeath v. Westmeath*. ⁽³⁾]

Cur. adv. vult.

JUNE 18. THE JUDGE ORDINARY. This case stood over that I might consider the point raised. It was a suit instituted by the wife against her husband for a dissolution of marriage, but in which the wife obtained a decree for judicial separation. Pending the suit, no order was made as to alimony, neither was any application on that subject made at the time the decree was pronounced. Since then the wife has filed a petition, in which she alleges that her husband has certain sources of income, and prays for permanent alimony. The husband has not answered this petition, but has appeared under protest, on the ground [413] that the court has no *power to allot permanent alimony after it has made its final decree of judicial separation. The court asked for some authority for this proposition, and it was referred to some passages in Burns's Ecclesiastical Law (Marriage), vol. i. p. 508 c. But they merely say that permanent alimony is payable to the wife when she has proved herself entitled to it, and make no distinction as to the times when the court can exercise its powers. It was also contended that I am not in a position to admit this petition, by analogy from the wording of the 32d section (20 & 21 Vict. c. 85), by which similar powers are given to this court. The words of that section are, that the court may, on any such decree, order the husband to secure to the wife a gross or annual sum of money by way of permanent alimony. It seems to me that the argument to be drawn from the words of the statute is applicable only to the subject-matter of that section, namely, cases of dissolution of marriage. No question arises there as to permanent alimony

39 L. J. (P. M. & A.), 30.

⁽¹⁾ 2 Sw. & Tr., 246; 30 L. J. (P. M. & A.), 109.
⁽²⁾ 3 Knapp., 42.

on a decree for judicial separation. The rule which will guide the court in this matter will be that acted upon in the Ecclesiastical Courts in cases of divorce *à mensâ et thoro*. The question then is, was there any distinction maintained in those courts such as the one contended for? I find no trace of any such in any report or book of practice, and having conferred with the registrars, I find they are also ignorant of any rule in those courts, which would render an application for alimony after sentence inadmissible. In *Cooke v. Cooke* ⁽¹⁾ a sentence of divorce *à mensâ et thoro* was decreed in November, 1811, and in March, 1812, an application was made for permanent alimony; there had been no application for alimony pending suit. An appeal was prosecuted to the Arches Court against the amount of alimony allotted, but no objection was made to the time at which the alimony was allotted. Sir J. Nicholl said, "This was a suit by reason of adultery; the wife succeeded in that suit, the judge pronounced the libel proved, and decreed a separation; that sentence has been acquiesced in; the delinquency, therefore, of the husband has been established and is admitted. The court below then proceeded to allot permanent alimony to the wife; no alimony during the suit had been applied for, but as the wife had a separate income it was understood that an application *for any further allowance during the suit, as alimony, [414] would be resisted; and she remained content with her separate allowance. I consider this as tantamount to alimony during suit." The bearing of this last remark I do not quite understand; but the judgment satisfies me that the Ecclesiastical Courts entertained applications for permanent alimony after a decree for divorce had been made. On the whole, I see no reason why I should not receive this petition and decree alimony upon it. The court is obviously not *functus officio* after the decree, for it has power to increase or diminish the alimony allotted at any time when it can be shown that the husband's means have altered. If so, why may it not also award alimony for the first time after the decree? The husband must file an answer to the petition.

Attorneys for petitioner: *Mead & Daubeny*.

Attorneys for respondent: *Kingsford & Dorman*.

(¹) 2 Phillim., 40.

Although a decree for a divorce contain no provision for alimony the court may afterwards, by supplemental order, award alimony. *Kamp v. Kamp*, 44 How. Prac. Rep., 505.

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M. v. C.

[Law Reports, 2 Probate and Divorce, 414].

March 2, 1872.

M. (FALSELY CALLED C.) v. C.

Suit for Nullity — Failure of Proof — Effect of Delay — Costs.

A wife married in 1863, cohabited with her husband until 1870, and in 1871 instituted a suit for nullity by reason of his impotency. Having failed to establish the charge, her suit was dismissed, and as she had separate property she was condemned in costs.

Relief in suits of this nature is never accorded by the court unless the petitioner be prompt in seeking it and sincere in the motive for doing so. A petitioner made cognizant within four or five years after her marriage of her husband's impotency could not delay proceedings for three years more without being open to the charge of want of sincerity or promptitude.

The petitioner prayed for a decree of nullity of marriage on the ground of her husband's impotency. The respondent denied the charge, and alleged that the marriage had, in fact, been consummated. The cause was heard before the judge ordinary in *camera* on the 3d and 7th of February, 1872. The facts are sufficiently set out in the judgment.

Dr. Deane, Q. C., and *Dr. Swabey*, were for the petitioner.
Inderwick, for the respondent.

415] *THE JUDGE ORDINARY. The burden of proof in this case lies on the petitioner. She has to establish affirmatively the propositions that her marriage has not been consummated, and that the respondent is incurably impotent. The fact that this suit was not commenced until the lapse of nine years after the celebration of the marriage renders this burden peculiarly onerous. For lapse of time, independently of its effect as a bar to relief, upon grounds often recognized in this court, has always an important bearing on the evidence by which the charge of impotency is sought to be established, and upon the measure of proof to be required.

It is material to state at the outset that the ordinary medium of proof in cases of this kind is in this case wanting. The petitioner is not proved by medical examination to be a virgin. Neither of the two medical witnesses called on her behalf can affirm, from the physical appearances (even as a matter of strong probability), that sexual connection has never taken place. The utmost support that their evidence affords to the petitioner's case is this, that the appearances are not such as they would have expected if the respondent's story of continued intercourse had been true and free from exaggeration. But on this point it is to be borne in mind that the examination of the petitioner's

person was not made until long after all cohabitation had ceased. As direct proof of the petitioner's virginity, the medical evidence wholly fails. The whole matter virtually rests, therefore, on the petitioner's own account. Of this, it is enough to say that she represents the respondent as having from the first shown no desire for sexual intercourse, as having avoided sleeping with her, and when, after the lapse of some years, pressed by her to consummate the marriage, as having declared himself unable to do so. Further, she accounts for the absence of the ordinary signs of virginity by deposing to certain practices by her husband, upon which, in the view I take of this case, it is not necessary to dwell.

The whole of the petitioner's story is denied by the respondent, who swears that he had intercourse with his wife within a day after the marriage, and continued to do so at intervals throughout their cohabitation.

In this conflict of testimony between those who alone know the truth, the court naturally turns to external facts, and to such conclusions *as the conduct of the parties may offer by [416 way of corroboration. And a natural question to ask is this: When did the petitioner first become aware of the alleged deficiencies of her husband, and how did she conduct herself upon that discovery?

The marriage took place in December, 1863. In the autumn of 1866 the parties were in Paris, and the petitioner's mother was there with them. She had been married nearly three years; she declares herself to have made repeated attempts to get the respondent to sleep with her, and she represents him as uniformly repulsing all overtures on her part of caress or endearment. It would be natural that some complaint of this conduct should be made between mother and daughter; and, if it had, there is little doubt that such complaint would have led to questions and the disclosure of what she now alleges was the true state of things. Yet she made no communication whatever to her mother. Two more years passed away, without complaint or remonstrance, the parties still living on the continent and moving about from place to place. Early in the year 1868 the petitioner accompanied her mother to England, to attend the marriage of the petitioner's sister. And about this time the petitioner deposes that she had a full conversation with her sister, in which she disclosed her husband's conduct, and in which her sister made her fully acquainted with the wrong of which she now complains. Upon this, she says, she wrote to the respondent, asserting her rights, and on her return to him in France insisted on sleeping with him, which she did for three months. But, according to her account, the respondent was

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unable to consummate the marriage, and admitted that he was so.

Here, then, we arrive at a full knowledge on the petitioner's part of her own rights and her husband's deficiencies. What step does she take? Assuming her to feel and suffer under the wrong done her (an assumption which is the basis of her present suit), what steps would she probably take? Would she not again speak to her sister, then a married woman? Would she not revive the subject which had been previously discussed, and apparently without hesitation, between them? Or, having once spoken to her sister, would she not have taken her mother's advice? As a matter of probability it is impossible, I think, to 417] answer these questions in *the negative. But she speaks to no one on the subject, and makes no complaint to her relations.

At this period there is some very cogent testimony produced by the respondent, to prove that no cause for complaint really existed. For in the autumn in this same year, 1868, the parties were living at Norwood, and a surgeon is produced from that place who declares that the petitioner consulted him as to her being pregnant. His recollection of the advice which he gave is imperfect, and he cannot now be certain as to the opinion he formed; but he speaks with confidence to the fact that the inquiry was certainly made of him by the petitioner. His story is corroborated and amplified by the respondent, though denied by the petitioner and her mother, but it cannot fail to be regarded as entitled to considerable credence. I may add that the manner in which the petitioner denied all knowledge of this incident was not such as favorably to impress the court.

Another year passed away; still no complaint or communication to her family is made by the petitioner, though she is on good terms with her mother and in correspondence with her sister. On the contrary, a letter is put in evidence, written at this time (the autumn of 1869) to the petitioner by her sister, in which she says, "We had your sweet letter yesterday morning and were delighted to know how happy you are in your own pretty home?" Shortly after this, the petitioner alleges that the respondent became unkind to her; used bad language, and on one or two occasions struck her. Whether this be true or not, it is undoubted that about November in this year, 1869, the petitioner, with the respondent's consent, left him and came to England on a visit to her mother, with whom she remained nearly five months, at the expiration of which the respondent joined them in the Isle of Wight, in February or March, 1870. At this period it is undoubted they had serious disagreements. It is also undoubted that at this time the respondent discovered

by means of an anonymous letter that his wife had been carrying on a clandestine correspondence with a gentleman named Y., whom she had known in Paris, and whose attentions to her there had been observed and complained of by her husband. From this gentleman she admitted she had received letters addressed to her by initials only, and directed to the post office. *Such an occurrence may have had some effect in bring- [418 ing about an event which speedily followed. According to her account, she soon after this told the respondent she would not live with him, and he took a separate apartment. According to his, she called him a coward and a beggar, and said she would "make an end of it." According to both, a negotiation was set on foot for a separation. Attorneys were employed on both sides, and a deed of separation executed on the 28th of August, 1870, under which the petitioner, who had an income of 500*l.* a year, agreed to allow 100*l.* a year to the respondent, who had no means of his own.

From this time they lived apart, and nothing occurred until six months afterwards, when the petitioner, in February or March, 1871, had a conversation with her aunt, which led to her being questioned by her uncle, and she then, as she alleges, for the first time learnt that the remedy she now seeks was open to her, and this suit was forthwith commenced.

Upon this history of the married life of these parties the court has to ask itself whether the petitioner's conduct is such as to corroborate her account or that of her husband.

Giving the petitioner credit for a reticence which might be natural while she remained in partial ignorance upon sexual subjects, it is difficult to account, if her account be true, for a continuance of that reserve after 1868, when she knew all that she knows now, and when she had already confided in her married sister. But her total silence at the time of her separation is more significant still. Here were the husband and wife violently opposed to one another, the petitioner supported by her mother, within reach of her sister and friends, in communication with lawyers, incensed against her husband, and struggling for the means of getting away from him with as little sacrifice of her income as possible; she had, if her story is trustworthy, for two years at least known of her husband's impotency, and had resented it, and yet, so far as appears in evidence, to no member of her family or friend, and to no lawyer, did she then make any allusion to the wrong from which she now alleges she had all along suffered. She might not, indeed, have been aware of the possibility of such a suit as this; but it is hardly credible that this wrong, if it existed, should not, even to her female relations, have found utterance at such a *time, and [419

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have been included among the grievances which she then laid to her husband's charge. In the face of this conduct on her part, bearing in mind that the oath of the respondent is set against hers throughout, and that the onus of proof lies upon her, I cannot judicially hold that she has established the facts upon which she claims relief. But if she had, some impediments would still remain.

Relief in suits of this nature is never accorded by the court unless the petitioner be prompt in seeking it and sincere in the motive for doing so. The failure of proof on the issue of fact makes it needless to enlarge on these two conditions in the present case. But I cannot hesitate to say that if the petitioner was, as she alleges, made cognizant within four or five years after her marriage of her husband's impotency, she could not delay these proceedings for three years more without being open to the charge of a want of sincerity or promptitude. In saying this I am not forgetful of the fact that she may not have known that such a suit as this could be entertained. But the requirement of promptitude could never be enforced by this court if it were first necessary to prove the existence of such knowledge. The general circumstances of each case and the facilities of the party aggrieved for obtaining legal advice and assistance will vary indefinitely, but the conditions to which I have alluded mean nothing if they do not mean this,—that the petitioner is bound to have evinced impatience under a sense of wrong, and a reasonable activity in complaint and redress.

The court cannot recognize these features in the conduct of the petitioner. On the contrary, she appears to have lived contentedly enough with her husband until, as she says, he ill-treated her, and if the impression of one of the witnesses was correct, she was more moved to the institution of this suit when she first heard that it was open to her by the prospect of getting quit of the burden of supporting the respondent than by anything else.

The petition must, therefore, be dismissed, and as the petitioner has a separate income, she must, I think, pay the costs of the suit.

Attorneys for petitioner: *Leather & Maynard.*

Attorneys for respondent: *Bothamleys & Freeman.*

[Law Reports, 2 Probate & Divorce, 426.]

April 28, 1872.

*CRISP v. CRISP.

[426]

Settlements—22 & 23 Vict. c. 61, s. 5—Children's Interest in Settlements.

The court has no power to vary a marriage settlement, so as to deprive an infant child of the marriage of an interest secured to it by such settlement.

A DECREE absolute for the dissolution of the marriage, having been pronounced at the instance of the wife, she had presented a petition for a variation of settlements under the 22 & 23 Vict. c. 61, s. 5. The parties had subsequently agreed to an arrangement which they had desired to carry out by means of an order of the court.

The proposed arrangement and the question to which it gave rise, are stated in the following report of the registrar:

"In this case I have seen the solicitors of the petitioner and respondent. The order that the court will be requested to make is so peculiar that I forbear to suggest any form of order, and merely raise the question for the opinion of the court whether any such order can be made. By marriage settlement dated the 3d of October, 1866, certain funds were settled in the usual way in favor of the respondent and petitioner successively for life, with remainder to the children of the marriage. There is one child an infant. It is agreed that the court shall be asked to extinguish the life interest of the respondent in this settlement, provided that it will deal with a post-nuptial settlement in the manner proposed. With this report, I forward the terms of the agreement that has been entered into. By post-nuptial settlement, dated the 9th of July, 1867, there was settled the moiety of a farm in Norfolk (the whole farm has been valued at 2460*l.*) and 1000*l.* since invested in consols (the two properties, however, being subject to a mortgage, which, with interest due, amounts to 850*l.*), on the father and mother of the respondent, who are both living, the respondent and the petitioner successively for life, remainder to the issue of the marriage. I am informed that the parties to this suit have been advised that this settlement being a voluntary one, may be set aside. I have suggested that it might be better that this should be done by a court of equity instead of its being done in effect by an order of this court. The proposal, however, which is submitted to this court is that the interest of the parties to the suit and of the child of the marriage under this settlement should *be extinguished, and in lieu thereof [427

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that 500*l.* should be settled on the petitioner for life, with remainder to the child. The reversion to the child of the property in question has been valued at 217*l.* only, probably nearly the same as the reversion of the 500*l.*; but in truth forced scales of reversions are no real test of their value to the persons entitled to them, and I doubt if any man of business would advise any person entitled to a reversion on the death of a person considerably older than himself to part with it if it could be avoided. I cannot therefore report that I consider this arrangement beneficial for the child unless the court will treat the post-nuptial settlement as inoperative."

April 7. *Searle*, for the petitioner, moved for an order in the terms of the agreement, and submitted that it would clearly be to the advantage of the child to have a certain sum of 500*l.*, instead of a reversion of doubtful value.

Inderwick, for the respondent and the other parties interested, supported the motion. *Cur. adv. vult.*

April 28. THE JUDGE ORDINARY. I took time to consider whether it was within the powers conferred on this court by the statute, to carry out the desires of the parties by making an order that would affect a voluntary settlement entered into after their marriage under which the child of the marriage takes a certain interest in the property settled. Under consideration, I am of opinion that to do so, however much the court may desire to carry out the arrangement, would exceed the powers conferred on it by the statute. It is suggested that this settlement is one that may be set aside by another court; but if that be so, it does not follow that this court has power to set it aside. Although it may be true that, judging from the ordinary duration of life, and the probability of the different events contemplated by the settlement, the child would perhaps derive a larger benefit from the proposed alteration than it could do under the terms of the settlement, the court is not at liberty to enter into such a speculation, and I must reject the motion.

Attorneys for petitioner: *Townley & Ford.*

Attorneys for respondent: *White, Borrett, & White.*

[Law Reports, 2 Probate & Divorce, 428.]

May 4, 1872.

*GOWER V. GOWER, PEARSON, HILL, and BUNN. [428]

Suit for Dissolution — Respondent's Adultery brought about by Petitioner's Agent — Petition dismissed.

If a person employed by a husband to watch his wife for the purpose of obtaining evidence of her adultery, brings about an act of adultery, the husband cannot obtain a decree of dissolution on the ground of such adultery, although he may not have directed or authorized his agent to bring it about.

Sugg v. Sugg and Moore (31 L. J. (P. M. & A.) 41), considered.

Picken v. Picken and Simmonds (34 L. J. (P. M. & A.) 22), affirmed.

THE petitioner was the son of a coal merchant and contractor, in the neighborhood of Dudley. He married the respondent in 1864, and cohabited with her until the autumn of 1867, when he separated from her in consequence, as he alleged, of her habitual extravagance and intoxication. A deed of separation was executed in May, 1868, by which an allowance was secured to her, and the present petition for dissolution of marriage, alleged that she had been guilty of divers acts of adultery since the separation. The respondent, in her answer, denied the adultery charged, and made counter charges of cruelty and connivance, and further alleged as follows:

"That the petitioner has been guilty of willful neglect and misconduct, conducing to the alleged adultery, if any, inasmuch as the petitioner has, since the month of August, 1867, always lived separate and apart from the said respondent, and has engaged himself to be married to another woman, and solicited and procured the co-respondent, Joseph Hill, to induce the respondent to commit adultery, in order that the petitioner might obtain a divorce from the respondent."

Pearson filed an answer traversing the adultery. Hill appeared, but filed no answer, and Bunn did not appear. The cause was heard before the judge ordinary, without a jury, on the 1st, 2d, 3d, and 4th of May, 1872. The judge ordinary came to the conclusion that the petitioner had failed to establish the adultery charged with Pearson and Bunn, and that the respondent had failed to establish the charge of cruelty.

The adultery with Hill was alleged to have been committed whilst the respondent was residing at a public house at Old Swinford, near Stourbridge, called the Seven Stars, of which [429 Pearson was the landlord. Hill was a visitor at this house, and there made the respondent's acquaintance. It was proved, and not denied, that the respondent and Hill and some other persons had gone together from the Seven Stars, on a pleasure excursion,

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and that they had been absent for three or four days, and visited Worcester, Wolverhampton, and Birmingham, passing a night at each place. The respondent and Hill further admitted that they had been in bed together at one or more of those places, but they denied that they had been guilty of adultery. A man named Williams, and a woman of the town who passed as his wife, and a man named Gooding, with a woman who passed as his wife, accompanied them on the excursion; and their case was, that Williams, who had been employed by the petitioner to obtain evidence of adultery against the respondent, had planned the excursion for the purpose of bringing about their adultery; that he had made them both intoxicated, and when they were insensible had put them to bed together. The petitioner admitted that some short time before the excursion he had employed Williams to watch the respondent, and to obtain evidence of her adultery, but denied that he ever instigated him to induce her to commit adultery, or sanctioned his taking any steps with that view. Neither Williams nor Gooding was produced as a witness.

Montagu Chambers, Q.C., (Dr. Spinks, Q.C., and Lord, with him), for the petitioner, submitted that if the adultery with Hill was proved, the petitioner was entitled to a decree whatever conclusion the court might come to as to Williams's conduct, the petitioner not having sanctioned it, and being in no way responsible for it: *Sugg v. Sugg and Moore*.⁽¹⁾

Huddleston, Q.C., (Day, Q.C., and E. Ashley, with him), for the respondent, relied on *Picken v. Picken & Simmonds* ⁽²⁾, and submitted that the petitioner was not entitled to a decree, by reason of an act of adultery, which even if committed, had been brought about by his own agent.

Greenhow, was for the co-respondent Pearson.

430] *THE JUDGE ORDINARY. The evidence in this case gives rise to several questions, the first of which is whether the husband is proved to have been guilty of cruelty. The parties lived together for about three years after their marriage, and in the autumn of 1867 the wife left the husband's home and went to reside with her parents. An execution being put into the husband's house she continued with her parents; her father brought an action against the husband for maintenance, and in the result a deed of separation was executed in January, 1868. I think the respondent has made out no case of cruelty, and that the separation came about in consequence of her habits of extravagance and intemperance. Under the deed the petitioner

(1) 31 L. J. (P. M. & A.), 41.

(2) 34 L. J. (P. M. & A.), 22.

contracted to allow her 1*l.* a week, and he appears to have paid that sum regularly through his solicitor. In 1870, he is said to have discovered that she had committed adultery. Now I must repeat what I have often had occasion to say in previous cases ; that there is a wide difference between the position of a husband living contentedly with his wife and being told by some one of her adultery, and that of a husband living apart from her, and subject to a money payment for her support. The discovery in the one case is a source of pain and discomfort, while in the other it is a source of relief, as it may lead to a divorce. In the first case the husband receives the evidence brought to his knowledge with reluctance and distrust, and it is only when the matter is forced upon him by evidence from which he cannot withhold his assent that he takes it up ; but in a case like the present the husband is, as it were, on the look-out for evidence, and those who may have seen or heard anything against the wife, instead of being reluctant to let him know it, are prone to come forward because they are sure their tale will be well received, and the husband will be glad to hear that there is a means of escaping from the bond he has contracted. This is one of the latter class of cases, and the court is therefore bound to watch the evidence narrowly. [Having reviewed the evidence as to the charges of adultery with Pearson and Bunn, and stated his conclusion that neither charge was made out to his satisfaction, his lordship proceeded as follows :] The main issue for the consideration of the court is as to the adultery with Hill. It no doubt involves a question of law, but the first question is one of fact. Did Williams, on the *journey to Worces- [431 ter, act merely as a person who went to see what was going on there ? Or was he the person who brought the journey about ? Or even if he did not bring the journey about, did he try to bring the respondent and Hill together, and endeavor to induce them to commit adultery ? The matter may be viewed in two opposite aspects ; one is, that Williams having been told to watch the respondent, and having access to the public-house where she lived, and where the co-respondent was a constant visitor, may have ascertained that they had planned a journey to Worcester together, and being then in the petitioner's pay, may have taken advantage of the circumstance to join the party, in order to find out what was going on. If he confined himself to that course he would be within the first proposition, and would merely be acting as a witness who could prove the adultery. But the other aspect of the matter is very different ; it is that, being at the public house and able to converse there with the respondent, he may have forced himself upon the acquaintance of the co-respondent and plied him with drink, and may have

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suggested the journey to Worcester — nay, he may have arranged the journey himself, and may have induced these two people to start from the Seven Stars to go upon a short jaunt, from which they were to return the same evening, he all the while intending to carry them to Worcester. He may have persuaded them to go to Worcester without their having the slightest idea of criminality, and may then have induced them to go to a public house and encouraged them to get drunk, and suggested their occupying the same bed. The respondent and correspondent go further, for they say he had them put to bed when they were so drunk as to be unconscious. Without going so far as that, it is obvious that the view I have suggested is a possible and not a very improbable one.

The account given by the respondent and Hill is that they were persuaded into this visit to Worcester by Williams, that neither of them had any notion of staying the night or of sleeping together, and that Williams paid all the expenses. They add that they did not even know they had gone to bed. When these two aspects of the case are presented to the court, how very material it is that Williams should be produced to say which story is the true one. If Williams was acting, as the 432] petitioner says he was, as his agent *merely for the purpose of watching what occurred, why is not Williams here, and why was he not called at the outset of the petitioner's case? It might be very desirable to corroborate him by the evidence of other persons, but he is the first and most material witness to explain how it came about that they were together, and that he went with them. He might be able to tell us who it was that arranged they should sleep together after they arrived at the inn. Golding also was a member of the party; he was paid something by a person who got the money from the petitioner's attorney, and he is not called. If the evidence of the respondent and Hill as to what occurred is not true, how is it that those people who belong to the party were not called to contradict them? In the total absence of any evidence on the other side, the court cannot but give credence to their story so far as to believe that Williams induced and brought about their going to bed together. To what extent they were intoxicated when they went to bed, it might be difficult to ascertain; but that they were brought to the place by the contrivance of Williams, for the purpose of being discovered committing adultery, is the conclusion at which the court is forced to arrive.

Thereupon the question of law arises, and it is argued that, if the case can be carried no further, the petitioner is entitled to a decree. The case of *Sugg v. Sugg and Moore* ⁽¹⁾ was relied

(1) 31 L. J., (P.M. & A.), 41.

on; but that is not a very satisfactory authority on which to decide an important question of law, because it is the report of a summing up to a jury, in which the learned judge would be more diffuse than in giving judgment, and might very possibly use expressions which did not convey his precise meaning. Besides, the question in that case was whether there had been collusion between the petitioner and the co-respondent and other persons. The allegation in the answer was that "the petitioner, in collusion with the co-respondent and with divers other persons, in or about the month of October, 1860, procured the defilement of the respondent by the co-respondent, which is the adultery (if any) alleged in his petition;" and it was in reference to that allegation that the learned judge made the following observations upon which the petitioner relies:

"On the part of the respondent it is said that this was [433 an offer of money to induce either Axford or Moore to betray the woman into committing adultery again, in order that they might be able to prove it; and if Walter Sugg did give the money for that purpose and with that object, with the knowledge and the concurrence of the petitioner, I think that the petitioner would not be able to avail himself of the proof of the adultery so committed. But it is one thing to say to a man, 'You will watch this woman, so as to be able to give evidence that she has committed an act of adultery,' and another thing to say, 'You will betray her into committing an act of adultery.' There is no direct proof on the point, but still you may infer from the evidence that the husband was privy to what was done by Walter Sugg, and that there was no dissent on his part; but there is an absence of any evidence that the husband arranged with him that he should procure some person to commit adultery with Mrs. Sugg — that he should hire an adulterer and procure her defilement. If a husband, believing his wife to be chaste, were to attempt in any way to place her in a situation where she would be likely to fall — if he were to induce a man to set about to seduce and to defile her — nothing could be more base and detestable than such conduct, or more dangerous to society. But it is a very different thing to obtain evidence against a woman who is living as an abandoned prostitute. If Axford made an arrangement with Moore, and said, 'Now, Moore, they have offered me 5*l.* to get evidence, and if you will commit adultery you shall go shares with me,' that would not affect the husband. There would be no corrupt agreement on his part, even supposing that Axford got Moore to join the party at the public-house at Barnet, in order that they might get the 5*l.*; that would not affect the petitioner's case."

If by these observations the learned judge merely intended to

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convey that it was not a necessary result of the evidence that the petitioner was acting in collusion with the co-respondent, that may be so; but I desire to state directly and broadly, in order, that, if I am wrong, I may be corrected by a court of appeal, that in my opinion, if a husband employs a man to get evidence of adultery upon which to obtain a divorce, and the man so employed sets about to procure the defilement of the wife, and by [434] the intervention *of that man the wife is purposely induced to commit adultery, the petitioner has no right to a remedy in this court for such adultery; and I further think that the husband would have no right to a remedy even if it were proved that he had not given any distinct orders for the purpose.

The law of principal and agent has been adverted to in argument; and no doubt an agent cannot bind a principal except within the scope of his employment. But it is one thing to say that a principal is not responsible for the act of the agent, for which he had no authority, and another thing to say that he can take advantage of an act procured by the agent by means of false representations, on the score that he did not give authority for those false representations. I think it will be found to be good law that, if an agent procures a contract by false representations, the principal cannot take advantage of the contract so obtained. Therefore it is not necessary for me to determine whether Mr. Gower did give authority to Williams to bring about what was brought about. I have no reason to think that Mr. Gower has kept back anything from the court. He gave his evidence in a very straightforward manner, and like a man of honor; and I think it quite possible that he did not tell Williams to do what Williams appears to have done; but at the same time, he never warned him not to do what a man of his class and character would be likely to do. The very first thing that would occur to such a man, if evidence were not forthcoming, would be to make an occasion which should furnish that evidence. In that point of view the petitioner is responsible for the act of his agent. But I decide the case on the broader ground that the petitioner cannot obtain the benefit of redress in this court for an act of adultery brought about by his own agent. I dismiss the petition, with the costs of the respondent and of the co-respondent Pearson.

Attorneys for petitioner: *Combe & Wainwright.*

Attorneys for respondent: *Walker & Son.*

Connivance by a plaintiff at the adultery of the defendant, destroys all claim to remedy by way of divorce though the adultery be proved and his consent and privity with and connivance therat may be shown by circumstances. *Myers v.*

Myers, 41 Barb., 114; 2 Blash. Mar. & Divorce (5th ed.), §§ 1-32.

A husband who once connives at his wife's adultery with A., is barred from obtaining a divorce for subsequent adultery with him and, in some cases, even

with another. A husband who willfully abstains from taking any steps to prevent his wife's adultery, which he ought reasonably to expect to occur, will be held to connive thereat. *Gipps v. Gipps*, 11 House Lords Cas., 1.

A husband who takes money from the adulterer to abstain from legal proceedings and then leaves his wife in a situa-

tion likely to occasion a renewal of the adultery will be held accessory thereto. *Gipps v. Gipps*, 11 H. L. Cas., 1.

The court will view with disfavor the tracking of a party, who has obtained a divorce, from place to place with a view to deprive him of the custody of his children. *March v. March* L. R., 1 Prob. and Divorce, 437.

[Law Reports, 2 Probate and Divorce, 435].

March 14, 1872.

*WILSON v. WILSON.

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Dissolution — Jurisdiction — Domicile — Delay — Wife's Costs of Counter Charges.

A Scotchman married a Scotchwoman in Scotland, and cohabited with her in Scotland until he discovered her adultery. He thereupon, in 1866, broke up his home and removed to England; and in 1871 he instituted a suit in England for the dissolution of his marriage on the ground of the adultery committed in Scotland previous to the separation. He swore in his examination that he had left Scotland with the intention of taking up his permanent abode in England.

The court, believing his evidence, held that he had abandoned his domicile of origin and acquired an English domicile, and that it had jurisdiction to dissolve the marriage.

The oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive, but the question for the court is whether, upon a review of all the circumstances, it gives credit to his evidence.

Adultery was committed in 1866, and a suit was instituted in 1871. The petitioner was a material witness on the issue of adultery. The inadmissibility of his evidence until after August, 1869, when the Evidence Further Amendment Act was passed, was accepted as sufficient explanation of the delay. Want of means is also a sufficient excuse for delay.

The wife's costs of counter charges of adultery against her husband were disallowed, although they had been paid into court, the evidence by which those counter charges were supported being false, and there being no reasonable ground for making them.

THE petitioner, George James Wilson, prayed for the dissolution of his marriage with the respondent, Mary Stuart Craigie Halketh Wilson, on the ground of her adultery with Archibald Howell. The respondent traversed the charge of adultery, and made numerous counter charges of adultery against the petitioner, and further alleged that he had been guilty of cruelty and of unreasonable delay. The answer further alleged as a plea to the jurisdiction, that the petitioner and respondent were domiciled in Scotland, and that the marriage was contracted in Scotland, and the alleged adultery was committed in Scotland.

(¹) The petitioner took issue on this answer.

The alleged adulterer, Howell, had originally been made a co-respondent, but having appeared under protest and pleaded to the jurisdiction, the court, at the instance of the petitioner, dismissed him from the suit. (²)

(¹) Ante, p. 341.

(²) Ante, p. 353.

436] *The issues joined between the petitioner and the respondent were heard before the judge ordinary without a jury on the 8th, 9th, 10th, 11th, and 30th of May, 1872.

A number of witnesses on both sides, including the petitioner and the respondent and the alleged adulterer, were examined; but it is unnecessary to state the facts of the case, except so far as they bear on the question of jurisdiction. The petitioner was a Scotchman by birth, and he married the respondent, a Scotch woman, in Scotland, on the 9th of July, 1861. They cohabited in Scotland until November, 1866, when the petitioner separated from the respondent in consequence of discovering her adultery with Howell, his butler. Immediately after the separation he came to England, where his mother was residing, and he had lived with her up to the time when the cause came on for hearing, first, at Surbiton, and afterwards at Anerley, in the county of Surrey. He had from time to time visited Scotland, and he retained the lease of a shooting lodge on Loch Lomond, called the Ptarmigan, which he had built before the separation. He was a partner in some ironworks in Scotland, from which his income was derived, but he took no part in the management of the business; and he swore that he had no intention of returning to Scotland, and that when he left it towards the end of 1866, it was with the intention of permanently residing in England.

Sir J. Karslake, Q.C. (Dr. Spinks, Q.C., and Inderwick, with him), for the respondent. The petitioner's oath as to his intention is not sufficient to satisfy the court of his change of domicile: *Manning v. Manning*.⁽¹⁾ The fact that he has acquired no residence of his own in England, but is merely a visitor at his mother's house, that his business is in Scotland, that he retains the Ptarmigan shooting lodge, that he continues his subscription to a club in Glasgow, and that there are expressions in some of his letters indicating a desire to return to Scotland, as soon as he is released from his pecuniary difficulties ought to lead the court to the conclusion that notwithstanding his declaration of intention he has never lost his domicile of origin. It is doubtful whether the court was right in assuming jurisdiction in *Brodie* 437] v. *Brodie* ⁽²⁾, *and the point was not argued, but the petitioner has not even the permanent and *bonâ fide* residence which was considered necessary to found the jurisdiction in that case.

All the evidence relating to the respondent's adultery which has been laid before the court, was known to the petitioner at the time of the separation or very shortly afterwards. He ought not to have waited from 1866 until April 1871, when this suit

(1) *Ante*, p., 223.

(2) 2 Sw. & Tr., 259; 30 L. J. (P.M. & A.), 185.

was instituted, before taking proceedings, and the delay must be considered unreasonable.

O' Malley, Q.C. (*Dr. Deane*, Q.C., and *Searle* with him), for the petitioner. It is not denied that the petitioner has in fact resided in England since 1866, and the only question is whether the court gives credit to his evidence, that when he broke up his establishment in Nov., 1866, and left Scotland, he intended to abandon his Scotch domicile and settle in England. He had every reason after the discovery of his wife's infidelity to induce him to leave Scotland, all the ties which bound him to Scotland were broken, and his mother and all his surviving relations were settled in England. The fact that his income is derived from property situated in Scotland is immaterial, for it has never been suggested that domicile depends upon property. In *Manning v. Manning* ⁽¹⁾ it was proved that the husband had not in fact abandoned his Irish domicile, and his evidence was disbelieved, but in this case the petitioner's evidence is uncontradicted, and there is no reason to discredit it. Most of the authorities are cases where the question of domicile for the purposes of succession has been raised, and where the court has had to form a conclusion from ambiguous and inconsistent declarations and acts of a deceased person, but where the person whose domicile is in question has been examined and cross-examined, the only question is whether his evidence is to be believed.

As to the unreasonable delay, the petitioner's own evidence was very material to the question of the respondent's adultery, and the Evidence Further Amendment Act by which his evidence was for the first time made admissible was not passed until August, 1869. Further, it was proved that until a recent date his pecuniary affairs were much involved, and he was 438] mainly dependent on his mother. *But he separated from his wife as soon as he discovered her guilt, and he has never since indicated the slightest intention of condoning it or of resuming cohabitation with her.

The following cases were cited on the question of domicile : *Bell v. Kennedy* ⁽²⁾; *Pitt v. Pitt* ⁽³⁾; *Yelverton v. Yelverton* ⁽⁴⁾; *Shaw v. Gould* ⁽⁵⁾; *Shaw v. Attorney-General* ⁽⁶⁾; *Munro v. Munro* ⁽⁷⁾; *Udny v. Udny* ⁽⁸⁾; *Dolphin v. Robins* ⁽⁹⁾; *Jopp v. Wood* ⁽¹⁰⁾; *In the goods of Raffanel* ⁽¹¹⁾; *Dalhousie v. McDouall* ⁽¹²⁾.

Cur. adv. vult.

⁽¹⁾ *Ante*, p., 228

⁽²⁾ *Law Rep.*, 1 Sc. Ap., 807.

⁽³⁾ 4 *Macq.*, 627.

⁽⁴⁾ 1 *Sw. & Tr.*, 574; 29 *L. J. (P. M. & A.)*, 34.

⁽⁵⁾ *Law Rep.*, 3 H. L., 55.

⁽⁶⁾ *Ante*, p., 156.

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⁽⁷⁾ 7 *Cl. & Fin.*, 842, 871.

⁽⁸⁾ *Law Rep.*, 1 Sc. Ap., 441.

⁽⁹⁾ 7 *H. L. C.*, 890.

⁽¹⁰⁾ 34 *Beav.*, 88; 34 *L. J. (Ch.)*, 211.

⁽¹¹⁾ 3 *Sw. & Tr.*, 49.

⁽¹²⁾ 7 *Cl. & Fin.*, 817.

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THE JUDGE ORDINARY having reviewed the evidence as to the respondent's adultery, said that it left no doubt whatever on the mind of the court that for a long time before the separation she had been carrying on adultery in a most degrading form, that is, not with a person of her own class and education, but with her husband's butler. *Primâ facie*, therefore, the husband had a right to come to any court that had jurisdiction to relieve him from such a wife.

[In reference to the counter charges of adultery against the petitioner, his lordship said:] The court has next to consider the defense which has been made, and the way in which that defense has been conducted: and I must say that since I have sat in this court I have never seen a defense conducted in such a resolute and uncompromising manner. When the suit began the wife entered an appearance, but not under protest, although she had a point of jurisdiction well worthy of being raised. She entered an appearance generally; and then she wished to plead to the jurisdiction only. The effect of that would have been to hang up the suit for a long time. The opinion of this court as to jurisdiction would have had to be taken in the first instance, and then probably there would have been an appeal to the house of lords, so that the degrading facts of her misconduct would for a certain length of time, have been excluded from public observation.

439] *The court held, that according to the rules and practice of this court she could not take that course, that she had let the time go by, and she must therefore plead to the merits, although it was open to her afterwards to raise at the hearing the point of jurisdiction also. Accordingly so she did, but not until she had availed herself of the right which everybody has, of appealing to the full court which affirmed the decision of the court of first instance. In the meantime, the co-respondent appeared, and as I see, by the same proctor, but he appeared under protest. He was therefore in a position to raise this question of jurisdiction before the merits were tried, and under cover of his name (for the court can hardly believe but that it was Mrs. Wilson who was really fighting), a vigorous attempt was made to prevent the court from getting at the merits, and it was said, "Why, this man at least has a right to raise the question of jurisdiction *simpliciter*, and it would be very improper to try the merits as against him before the question of jurisdiction is disposed of." There was an act on petition filed accordingly by him disputing the jurisdiction, but the petitioner then said, "Well, I have no desire to make this man a party to this suit. I only make him so in obedience to the act of parliament. I am quite willing, if the court says it has no jurisdiction over

him, to dismiss him from the suit;" and accordingly the petitioner proposed to do so; but the butler strongly objected to being dismissed, and he said he must go on and fight the question of jurisdiction which, after all, if he succeeded, could only end in his being dismissed. Thereupon the court held that inasmuch as he applied to be dismissed in the suit on his own petition, and inasmuch as the petitioner was willing to dismiss him, he could not refuse to be dismissed. Waiving all question of jurisdiction and no longer insisting on his right to bring him here before the court, the petitioner said, "I will consent to dismiss him as a party to the suit, and pay all his costs if he has incurred any," and he was dismissed accordingly.

These steps, therefore, which certainly were steps of a very vigorous and uncompromising defense, did not avail to prevent the merits of the case being tried.

And now I come to the course taken by Mrs. Wilson, when those merits were about to be tried. Without any ground for suspecting *her husband of adultery, without any intima- [440 tion from anybody, so far as the evidence goes, that he had been in the habit of leading a loose life, with nothing to point to the facts which are afterwards set up as establishing her husband's culpability, she appears to have set to work by means of a detective officer, a Mr. McKelvie, who, by the way, was not called as a witness to explain his proceedings or motives, to scour the brothels and low houses of Glasgow, which was the nearest large town to the place where they lived, to see whether some prostitutes could be found who would say that seven years ago they could prove that Mr. Wilson had been in the habit of frequenting those bad houses and committing adultery with them. Accordingly the result of Mr. McKelvie's active operations was that a string of, I really do not know how many, adulteries was charged against this gentleman. If adultery is established, of course, the wife is entitled to the benefit of it; but when adultery is charged under such circumstances, with so obvious a motive, and when it is attempted to be proved by those who have shown by their conduct in the case what a vigorous and determined fight they were prepared to make, of course the court must look upon such evidence with great care, and be perfectly well satisfied that the witnesses intend to tell the truth and intending to tell the truth, that their memory accurately serves them. Apply those tests to the evidence given by these women, and I confess it wholly fails to satisfy my mind.

[His lordship referred to the evidence by which the counter charge of adultery had been supported, and afterwards, in dealing with the question of costs, added:] I desire to say on this occasion, and I hope it may be understood in future cases,

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that I will never make a husband pay for such a defense if it fails — I am confining my remarks entirely to the counter charge of adultery — got up by such means. The costs of a defense of that nature must never, I think, be included in the costs payable by the husband, unless it should turn out to be successful. When a husband has taken his wife in adultery, or has fair ground of complaint against her, and institutes a suit for a divorce, the court will never allow her to set detectives to work at his expense without anything to indicate that he has been to blame, and without any clue which it might be desirable to 441] follow out, without any circumstance whatever *existing to justify an inquiry, except the desire of the wife to find out something which shall deprive him of his right to a decree. Therefore, although the respondent is entitled to her costs to the extent of the money paid into court, there will be a direction to the registrar not to allow any of the costs relating to the counter charge of adultery.

[His lordship next referred to the evidence bearing upon the issue of the petitioner's cruelty, and came to the conclusion that it did not establish the charge.]

[Upon the question of unreasonable delay, his lordship said :] With regard to the delay, I think the husband gives a sufficient answer. He says, "first of all my pecuniary circumstances were embarrassed, that is one reason. But another reason is that until the law was altered enabling me to get into the witness box and to depose to the occurrence of the 14th of October, when I found Howell locked up in my wife's bedroom, I had nothing to go upon but the evidence of servants;" and looking to the very extraordinary and unusual species of intercourse, I mean the intercourse between a lady and her butler, which forms the subject of inquiry in this case, I can quite understand he might be unwilling to rely solely upon the evidence of what servants may have seen to establish an adultery in itself so improbable. Therefore I think the objection on the ground of delay falls to the ground.

[His lordship then proceeded to the remaining question raised by the respondent, whether the court had jurisdiction to entertain the suit :] The respondent is quite entitled to raise the question now that all the facts are before the court, and the court ought to be perfectly satisfied that it has jurisdiction before it proceeds to make a decree. The grounds upon which it is said the court has no jurisdiction are, that the parties were married in Scotland, and lived in Scotland, and the adultery took place in Scotland, but what I think is mainly relied upon is that they were domiciled in Scotland at the time the suit commenced.

Now, it is not disputed that if the petitioner was domiciled in England at the time the suit was commenced this court has jurisdiction, but whether any residence in this country short of domicile, using that word in its ordinary sense, will give the court jurisdiction *over parties whose domicile is else- [442 where, is a question upon which the authorities are not consistent.

It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another. It is not possible, however, to avoid to some extent collision with the courts of different countries, because if the courts of every country adhered to domicile as the rule of jurisdiction, there would still remain the fact of domicile to be established; and as all countries do not adopt the same rules of evidence, the evidence on this question might be very different in one country to what it might be in another. And this is what has happened, I believe, in this very case. It is not regularly before me, but I am told that the court of Scotland has decided that the petitioner never acquired an English domicile, and that this conclusion was arrived at without his being called as a witness, which in Scotland could not legally be done. But in this court the petitioner was called as a witness, and swore to his own residence in this country, and to the intention with which he left Scotland to reside here.⁽¹⁾

It is not, however, necessary for me to decide on this occasion whether mere residence, short of domicile in this country, is sufficient to found the jurisdiction of this court, because I have arrived *at the conclusion that the petitioner was at the [443 commencement of this suit domiciled in this country.

⁽¹⁾ On the 22d of May, 1872, Mrs. Wilson instituted a suit for divorce on the ground of adultery against Mr. Wilson, in the Scotch court. Mr. Wilson pleaded to the jurisdiction, alleging the same grounds as those alleged by him in the English suit in

support of the English jurisdiction. The Scotch court having examined the witnesses on both sides, overruled the plea to the jurisdiction. The petitioner, however, was not examined, the evidence of the parties being inadmissible.

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I adopt the language of Lord Westbury in the case of *Udny v. Udny* ⁽¹⁾: "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, as soon as the change of purpose or *animus manendi* can be inferred, the fact of domicile is established." Now that being, I think, a very able exposition of the state of circumstances that would support the legal conclusion of a domicile of choice, the question is, whether in this case there are circumstances from which the court can properly infer that Mr. Wilson had made that choice. Most of the cases of domicile occur after the death of the party, and the court has therefore to infer from the character of the residence in a particular country to which he has removed himself, from the ties that he has created for himself, from the property that he has acquired, the obligations that he has entered into in connection with the new country. The court has to determine the fact that he has really chosen to reside there, as Lord Westbury puts it, "for an indefinite period as his home;" and if this were a case in which Mr. Wilson were dead, and the court had nothing to go upon but the fact of his residence here, and the way in which it arose, I do not think there would be enough to enable the court to come to the conclusion that he had taken up his domicile in this country. The facts are, that having been born in Scotland, certainly of Scotch parents, and therefore a domiciled Scotchman originally, and having passed a part of his early life in Scotland and part 444] in England, yet he never had any *home of his own there until the time of his marriage. His parents lived there, but before his marriage his father had died, and before the separation his mother had removed from Scotland permanently, as she tells us herself, and entirely. She had separated herself altogether from Scotland, and taken up her abode in England. The petitioner had upon his marriage hired, for he never bought, first Almond Bank and then the house at Drylaw, which were his permanent residences in Scotland; and he had in addition

(1) Law Rep., 1 Sc. Ap., at p. 458.

a shooting place called the Ptarmigan. But as soon as this adultery happened he immediately put an end to his holding at Drylaw. He sold part of his furniture, and put the rest aside, warehoused it, and came to England, and has lived ever since in England with his mother, and he swore that he had never any intention of going back to Scotland as a country in which he meant to reside. He was not a man of any landed property or position in Scotland, and he had, as far as I can learn, no relations living in Scotland. His mother lived in England, and to her he came. It is true he was partner in a business which was carried on in Scotland, but he was essentially a sleeping partner in that business, as from first to last he had not taken any part in the active management of it, and, in fact, knew nothing about the details. He was not capable of doing so if he had wished — there is no doubt about that. Therefore he had no business connection with Scotland beyond drawing from works established there a certain income. He comes to England and resides with his mother, never intending, as he swears, to go back to live in Scotland.

It seems to me that the question which the court has to ask itself is this: assuming that the mere circumstances attending the residence in England, if the man were dead, and we knew nothing of his intentions, except what we could gather from that residence, would not be sufficient to enable the court to arrive at the conclusion that he had adopted an English domicile, still when we have the man here, and when he swears that that was his intention, why should not the court believe him?

The court must not take his word as conclusive proof of the fact and if there are circumstances in the case which tend to show that what he says is not true or likely to be true, they may influence the conclusion at which the court would arrive. Therefore *the question is here not so much whether the [445] circumstances of his English residence tend to prove English domicile as whether, the man swearing to his intention to create an English domicile, there are such circumstances on the other side as warrant the court in throwing over his oath and disbelieving him. I am not aware that there are any such circumstances. First, as regards the business, that really could not connect him with Scotland as to residence. Then a great deal was said about Ptarmigan Lodge. But the history of it was, that he got the lease from the Duke of Athol, and laid out about £300 or £400 in building this little shooting lodge. This lease expires next year; but it is quite true that after he had ceased to cohabit with his wife, and after she had disgraced him in Scotland and he had come to England, he desired to prolong that lease. It is also true that in his letters he spoke

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of his desire to get back to Ptarmigan. But what for? Not because he meant to permanently reside there. He never had done so from the first; he used it during the autumn time when there was shooting going on, and in the summer, in the fine weather, when there was fishing to be had, but he had never used it as a permanent residence, for he was residing at Drylaw. I see no reason whatever, merely because he wished to continue the enjoyment of a Scotch shooting lodge, to doubt his word, that consistently with that he intended to have his permanent residence in England. Then the fact of his being a member of a club in Glasgow was relied on. It is quite true that on the occasion of his subscription falling due he wrote to his partner, and begged him to pay it, saying that he did not wish to disassociate himself entirely from Glasgow, because he would want to see his partner at different times, and would wish to have the facility when he went there, as he did occasionally, of sleeping and dining at the club. But the court must remember that a subscription to a club is not a permanent thing, but a thing that may be dropped at any moment. Then great stress was laid upon one of his letters where he is talking of getting back to Ptarmigan, and speaking of "the land of his fathers"; but I think that is nothing more than an expression. He was only alluding to Scotland, as the place where he was born, and I cannot see that indicates any intention to reside there. I may 446] point out that if he really had been coming *to England merely to obtain a colorable residence for the purpose of bringing this suit, if that were the sort of circuitous plot that he had entered into, he would hardly have written letters in the terms he did. Not only so, but he came to reside here at a time when the law of evidence was not altered, and when he had no reason to suppose it would be altered, and therefore when he would not have had any more chance of success in this country than in Scotland. I must repudiate that as not a fair charge against him.

If the court sees no reason, and I see none, to doubt this gentleman's word, why should it not believe him? Well, I do believe him, and I believe that he came to England with the intention of permanently giving up his connection with Scotland, and fixing upon England as his fixed place of abode and home. Is there any question that that constitutes domicile? I apprehend not; but if authority were wanted, it would be found in the judgment of Lord Westbury in *Bell v. Kennedy* (1). "We know very well," he says, "that succession and distribution depend upon the law of domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between

(1) Law Rep. 1 Sc. Ap., p. 320.

an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now this case was argued at the bar on the footing that as soon as Mr. Bell left Jamaica he had a settled and fixed intention of taking up his residence in Scotland. And if, indeed, that had been ascertained as a fact, then you would have had the animus of the party clearly demonstrated, and the *factum* which alone would remain to be proven would in fact be proven, or at least would result immediately upon his arrival in Scotland. So that, according to Lord Westbury's view, the true inquiry is, "Had he this settled purpose when he left Jamaica?" According to this view, therefore, if a man leave the country, in which he is domiciled with the settled view and intention of taking up his permanent abode in another country and arrives in that country and commences to take up that abode, that constitutes a change of domicile. This gentleman has done a great deal more than that; he has resided with his mother in England for years; and although it [447 is quite true that being in bad pecuniary circumstances, he did not evidence his permanent intention by purchasing any house or taking a house on a long lease, or permanently connecting himself by obligations of any sort or kind with this country in a way which sometimes happens in other cases, he still did all that, supposing his story to be true, might be expected of him. I think the court in every case must look at the species of evidence it would expect to obtain consistently with the circumstances of the man; and looking at the circumstances of this petitioner, the court could not expect to find him buying a home or land, or hiring a house on a long lease, or taking any of those steps which in other cases have been held to constitute strong evidence as to change of domicile. Change of domicile is to be inferred, as it seems to me, from the man's own oath, coupled with the circumstance that there is not sufficient evidence to induce the court to disbelieve it. Under these circumstances, I think the domicile is established, and the court has jurisdiction; and that being so, the court pronounces a decree *nisi*.

Solicitors for petitioner: *Newman, Dale, & Stretton.*

Proctor for respondent: *E. W. Crosse.*

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Symonds v. Symonds.

[Law Reports, 2 Probate and Divorce, 447.]

July 27, 1872.

SYMONDS v. SYMONDS and HARRISON.

Dissolution of Marriage—Respondent in Contempt for removing her Child—22 & 23 Vict. c. 61, s. 5—Alteration of Settlement for the collateral Purpose of enforcing an order of the Court.

After a decree *nisi* had been made on the prayer of the husband for a dissolution of his marriage, the respondent, under cover of an order of the court for access to her child, took possession of it, and removed it beyond the jurisdiction of the court:

The judge ordinary refused to alter the settlement made on the marriage of the parties, so far as relates to the property settled on behalf of the respondent, in such a manner and for the express purpose to compel the respondent to submit to the authority of the court, and to restore the child to the custody of the petitioner.

THE petitioner, Thomas Powell Symonds, applied to the court for a dissolution of his marriage with Anne Symonds, by reason 448] of *her adultery with Broadly Harrison. A decree *nisi* was made on the 22d of July, 1871, and the decree was made absolute on the 30th of January, 1872. After the decree *nisi* had been made, the respondent, under cover of an order of the court giving her access to her child, Caroline Elizabeth Symonds, contrived to obtain possession of it, and to remove it out of the custody of its father. In consequence thereof, on the 27th of October, 1871, the judge ordinary ordered an attachment to issue against her for contempt of court; but such order has not been served upon her, inasmuch as she cannot be traced. The child, who was born on the 27th of November, 1865, and was the only issue of the marriage, has not been recovered. By a settlement executed on the 4th of June, 1852, on the marriage of the parties, a sum of 10,000*l.* was assigned on behalf of the petitioner to trustees on certain trusts therein mentioned, and an equal third part of two sums of 2500*l.* and 2400*l.* which had been appointed in favor of the respondent by the Rev. Peter Cotes and Caroline his wife, the father and mother of the respondent, subject to the life interest of the latter. The trusts in relation to this fund were that, during the joint lives of petitioner and respondent, the income arising therefrom should be paid to the respondent for her sole and separate use without power of anticipation, and that, on the death of the respondent in the lifetime of the petitioner, it should be paid to him, and on the death of the survivor it should be held, both principal and interest, for the child or children issue of the marriage, to be assigned or transferred to them, on or at such ages, day, or time, and with such provisions for their maintenance or ad-

vancement, with such limitations over between or among them, subject to such charges, upon such conditions, and under such restrictions, and generally in such manner for their benefit as the petitioner and respondent or the survivor of them should appoint, and in default of appointment to be assigned or transferred to such children, if sons, on attaining twenty-one years, and if daughters, on attaining that age or marrying, in equal shares absolutely. And in case there should be no child of the marriage who should attain a vested interest in the said third part of the sums of 2500*l.* and 2400*l.*, then the said part is to be held in trust for the respondent absolutely, or if she should die in the lifetime of the petitioner, subject only to the life interest *of the petitioner therein, it is to be held on such [449 trusts, to and for such intents and purposes, and with and subject to such powers, provisos, and declarations as she may appoint, and in default of appointment for her next of kin in accordance with the provisions of the statute of distribution in case she had died unmarried and intestate.

After the decree had been made absolute, the petitioner prayed the court to vary the terms of the settlement, so far as relates to the sum of 10,000*l.* settled on his behalf by striking out the life interest of the respondent therein, and the powers and authorities which she might exercise in reference to it after the death of the petitioner, should she survive him, and by ordering that all powers and authorities, which by the settlement might during the joint lives of the petitioner and respondent have been exercised jointly by them, may be exercised hereafter by the petitioner alone, as if the respondent were dead; and as regards the other fund, the one-third part of the two sums of 2500*l.* and 2400*l.*, to order that until the respondent shall submit to the authority of the court and deliver up the said child to the petitioner, or after his death to some other person to be appointed by the court, the trustees shall pay the income thereof to the petitioner for his life, and after his death shall allow the same to accumulate, or apply the same as this court may from time to time direct; and that if at any subsequent time the respondent shall disobey any order of this court, in respect of the said child, or shall interfere, or attempt to interfere, or cause or induce any person to interfere, or be a party to any interference with the custody thereof, except under the express order of this court, the trustees shall cease to pay the income of the said sum of money to the respondent, but shall allow the same to accumulate as above, or apply the same as this court may from time to time direct, and further, that the interest of the child in the share of the said sums of 2500*l.* and 2400*l.* may at once be deemed, and be a vested interest therein. *

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The Rev. Digby Octavius Cotes, one of the trustees of the settlement, filed an answer to the petition to vary it, in which he stated that Mrs. Cotes, the mother, is still living, and that there is no income in the hands of the trustees payable to the separate use of the respondent; and, further, he submitted that no order should be made affecting the capital or income derived 450] from the Cotes family. *The registrar, to whom the petition was referred, reported that it would be sufficient if the court ordered that the trusts of the settlement be varied by extinguishing the life interest of the respondent in the sum of 10,000*l.*, and by ordering the trustees to hold the same, and pay the income thereof as if the respondent were dead, without having exercised any power of appointment over the same.

Dr. Spinks, Q.C. (*Bayford* with him) moved the court to vary the settlement as prayed. It had been found that a decree of sequestration is perfectly useless against a married woman if the trustees of her settlement are unwilling to obey it. There are no means of enforcing it. The 22 & 23 Vict. c. 61, s. 5, authorizes the court to make orders for the application of the whole or a portion of the property settled for the benefit of the children or of their respective parents. The court, therefore, has the power to make an order in the manner prayed, and will be anxious to do so in the present case.

Dr. Swabey for Mr. Cotes, the trustee, submitted that the court has no power to make the order. The object of 22 & 23 Vict. c. 61, s. 5, was not to compel a party to obey its decrees, but for a different purpose. At present there are no funds upon which an order can operate.

Cur. adv. vult.

July 27. THE JUDGE ORDINARY. There is no difficulty as to that part of the order prayed for which is to put an end to the wife's life interest in the husband's settled property. As to the other part of the application, which asks the court to lay its hand on the wife's own property, not on the ground that after her adultery has been proved she ought to be stripped of that property, but that she has committed a contempt of and a fraud upon the court by improperly obtaining possession of her child and taking it out of my jurisdiction, I think that such an order would not be a proper exercise of the powers of dealing with the wife's property conferred on the court by the statute. Those powers were conferred solely for the purpose of compelling the surrender of such portion of her settled property as, having regard to all the circumstances of the case, the court should think 451] ought to be surrendered for the *benefit of the husband and children, not for a collateral purpose. I must decline, therefore, to concede that part of the application.

Dr. Swabey asked for the costs of the trustee.

THE JUDGE ORDINARY. The trustee is virtually defending the interests of this woman who, having been guilty of contempt, is obliged to keep herself in the back ground. I shall make no order as to his costs.

Proctors for petitioner : *Clarkson, Son, & Greenwell.*

Attorneys for Mrs. Cotes : *Clarke, Woodcock, & Ryland.*

[*Law Reports, 2 Probate and Divorce, 451.*]

May 13, 1871.

PEARSON v. PEARSON and PEARSON.

Will — Execution — Acknowledgment of Signature — Attest and subscribe.

The deceased having called in A., who was an illiterate man, to his room, asked him to make his mark to a paper, which he did. A., at the deceased's desire, then fetched his wife, who was living in the house, and she also, at the deceased's request, placed her mark on the same paper. There was no evidence that the signature of the deceased was on the will at the time these marks were made, nor did the deceased in any way explain to the witnesses the nature of the document they signed :

Held, that the execution was invalid.

GEORGE PEARSON, of Hockwold-cum-Wilton, Norfolk, gardner, died on the 31st of March, 1870. The plaintiff, George Thornton Pearson, propounded a will of the deceased, dated the 9th of October, 1865. The defendants, Ambrose Henry Pearson and Henry Pearson, pleaded that such will was not executed in accordance with the provisions of the statute 1 Vict. c. 26. The court had been previously (on the 26th of July) applied to on motion to grant probate of the will, but had refused to do so, and required it should be propounded; and thereupon the defendants had been cited to see proceedings. The will was holograph, signed by the deceased, and had the word "witness," with the names of the witnesses, written by the deceased, opposite their marks.

Henry Whistler, one of the attesting witnesses, said : "I am a laborer. I was acquainted with George Pearson. I worked for him constantly. I remember, about five years ago, George Pearson had fits. I went to see him. He asked me to call in my wife. *We lived under the same roof with him. I [452 went and called my wife. George Pearson said : 'Are you a scholar?' I said : 'No.' He then said : 'Will you unlock that desk?' Deceased took a paper out of the desk, and said : 'If you cannot write, Harry, you will have to make a mark to this paper.' I made a cross. Pearson wrote on the paper. I cannot say he wrote his name on the paper before me. He said

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something about, 'this will have to go before a lawyer.' I cannot say the mark on this paper is mine. My wife was not in the room when I made my cross. Pearson did not say the paper was his will."

Susan Whistler, the other witness, said she was called by her husband. The deceased told her to put her mark on the paper, and she did so. On cross-examination, she said she heard the deceased ask her husband to take the paper out of the box. She was then in the passage.

April 20. *Dr. Tristram* appeared for the plaintiff.

G. Browne, for the defendants.

The cases referred to were: *In the Goods of James Thomson* ⁽¹⁾; *Hott v. Genge* ⁽²⁾; *Cooper v. Bockett* ⁽³⁾; *In the Goods of Holgate* ⁽⁴⁾; *Gwillim v. Gwillim* ⁽⁵⁾; *Beckett v. Howe* ⁽⁶⁾

Cur. adv. vult.

May 13. LORD PENZANCE. The question is, whether this will was duly executed. The evidence of the two attesting witnesses was very short, and I will read my note of it. Henry Whistler said: "The deceased was a gardener. He asked me to make my mark to a paper. I did so. He asked me if my wife was in. I said: 'Yes.' He said: 'Call her in.' I did so. She came. The testator told her to make her mark. She did so." The wife, Susan Whistler, said: "I was called in. I made a mark. My husband had made a mark before. I did not see him make a mark." There was a good deal of cross-examination; and it was contended that, as the wife was in the passage at the time the husband made his mark, it may be taken 453] she was present at that time. *My decision does not turn on that point; but if I had to decide whether the two witnesses were present at the same time, I should incline to the negative. There is no proof that the testator's name was on the paper at the time of execution. The witnesses are illiterate people; they can neither read nor write. The testator said nothing to either of them before they made their marks. He did not say the paper was his will, or what it was, or anything at all about it.

The court took time to consider its decision in consequence of one or two cases referred to by Dr. Tristram, especially a case of *In the Goods of James Thomson*. ⁽¹⁾ The authority upon which the court has acted up to the present time is *Gwillim v. Gwillim* ⁽⁵⁾, in which Sir Cresswell Cresswell held, that where a testator produces a paper, and gives the witnesses to understand it is his will, it is not necessary to have direct evidence

⁽¹⁾ 4 No. of Ca., 643.

⁽²⁾ 8 Curt., 160; 4 Moo. P.C., 265.

⁽³⁾ 4 Moo. P.C., 419.

⁽⁴⁾ 1 Sw. & Tr., 261.

⁽⁵⁾ 3 Sw. & Tr., 200; 29 L.J. (P.M., & A.), 31.

⁽⁶⁾ Ante, p. 1.

that his name was on the paper when he asked the witnesses to sign it; but the court is at liberty to judge from all the circumstances of the case whether it was there at that time or not. That is the substance of what was decided in *Gwillim v. Gwillim*.⁽¹⁾ I have followed the case on two occasions: *In the Goods of Huckvale* ⁽²⁾, and *Beckett v. Howe*. ⁽³⁾ In the former, in which it was proved the deceased had asked the witnesses to sign her will, I said: "It seems to be an established principle that this court may, independently of positive evidence, investigate the circumstances of the case, and form its own opinion whether the testator's name was on the will at the time of execution; and if it is satisfied it was so, the execution will be good." And in *Beckett v. Howe* ⁽³⁾ I said: "Provided the testator acknowledges the paper to be his will, and his signature is there at the time, that is sufficient." That is the way I have hitherto dealt with these cases; but in that cited (*In the Goods of Thomson* ⁽⁴⁾), Sir H. Jenner Fust expressed himself thus: "The court has held that an express acknowledgment is not necessary; that when a paper is produced by a testator to witnesses with his name signed thereto, and they have an opportunity of seeing his name, and they attest the same by subscribing the paper, they being present at the same time, *this is a sufficient acknowledgment of the signature by [454 the testator, though the signature was not actually made in their presence, or expressly acknowledged." No doubt that is a direct decision, which goes much beyond the other cases I have referred to. If the paper has the testator's name on it at the time the parties put their signature there, without any statement that it is a will, the execution is sufficient. On hearing that case cited, I thought it advisable to reserve my decision to enable me to review the other cases. In such review I have come upon *Ilott v. Genge* ⁽⁵⁾, in which Sir H. Jenner Fust repeats the same observation: "The production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the present statute." In that case there was an appeal to the privy council; and their lordships decided, that, even assuming the will had been signed by the deceased before the witnesses had been called in, the mere circumstance of calling in witnesses to sign without giving them any explanation of the instrument they are signing does not amount to the acknowledgment of his signature by a testator. As the case of *Ilott v. Genge* ⁽⁵⁾ was decided by the Court of Appeal, it must

(1) 3 Sw. & Tr., 200; 29 L. J. (P. M. & A.), 31.

(2) Law Rep., 1 P. & M., 375.

(3) Ante, p. 1.

(4) 4 No. of Ca., 648.

(5) 3 Curt., at p. 172.

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Pearson v. Pearson.

set aside any observations not in accordance with it made in *In the Goods of Thomson*.⁽¹⁾ In the case before me there is no proof that the name of the deceased was on the paper when the witnesses put their marks to it. All that is proved is, that the witnesses were called in, and told to make their marks, but no explanation was given to them of the document before them. I think that was not sufficient, and that the will was not duly executed.

The costs of both parties may be paid out of the deceased's estate.

Attorneys for plaintiff: *Pyke, Irving & Pyke*.

Attorney for defendants: *W. R. Ripley*.

(¹) 4 No. of Ca.) 643.

Where persons are called to witness a paper, which they do, in the presence of the testator, he at the same time subscribing it and declaring that it is his last will and testament, a request to the witnesses to sign their names as witnesses may be presumed; and so from any other competent and proper circumstances. *McKinley v. Lamb*, 64 Barb., 199; *Butler v. Benson*, 1 Barb., 526; *Coffin v. Coffin*, 23 N. Y., 9; *Baskin v. Baskin*, 86 N. Y., 419; *Doe v. Roe*, 2 Barb., 200; *Willis v. Mott*, 36 N. Y., 486; *Matter of Gilman*, 88 Barb., 364; *Peck v. Cary*, 38 Barb., 77, 27 N. Y., 9; *Brown v. De Selding*, 4 Sandf., 10, 8 N. Y., Leg. Obs., 224; *Smith v. Smith*, 2 Lansing, 266; *Gamble v. Gamble*, 39 Barb., 373; *Moore v. Moore*, 2 Bradt., 261.

If not subscribed by the testator in the presence of the witnesses he must acknowledge its execution in their presence. Execution and publication are distinct and independent acts; mere publication thereof without any other act is not a sufficient acknowledgment. *Ex parte Beers*, 2 Bradt., 163; *Butler v. Benson*, 1 Barb., 526; *McKinley v. Lamb*, 64 Barb., 199; *Baskin v. Baskin*, 48 Barb., 200, 36 N. Y., 416; *Abbey v. Christy*, 49 Barb., 276; *Brown v. De Selding*, 4 Sandf., 10, 8 N. Y., Leg. Obs., 224; *Hunt v. Mootire*, 3 Bradt., 322; *Wilson v. Hetrick*, 2 Bradt., 427; *Will of Harris*, *Tucker's Surr. Rep.*, 293; *Will of Newton*, *Id.*, 349; *Will of Hopper*, *Id.*, 378.

Although if a testator produces a paper to which he has personally affixed his signature, requests the witnesses to attest it and declares it to be his last will he has done all that the law requires. *Baskin v. Baskin*, 48 Barb., 200, 6 N. Y., 419; *Willis v. Mott*,

86 N. Y., 486; *Robinson v. Smith*, 13 Abb. Prac., 359; *Gamble v. Gamble*, 39 Barb., 373; *Moore v. Moore* 2 Bradt., 261; *Will of Harder*, *Tucker's Surr. Rep.*, 426; *McKinley v. Lamb*, 64 Barb., 199.

An acknowledgment by the testator of his signature and execution of the will is equivalent to the actual seeing, by the witness, of the physical act of subscription. *Hoystradt v. Kingman*, 22 N. Y., 372; *Robinson v. Smith*, 13 Abb. Prac., 359.

And the fact that the testator knew the character of the paper he was about to execute may be shown against the testimony of the subscribing witnesses. *Trustees v. Calhoun*, 25 N. Y., 422, reversing 88 Barb., 148.

When the witnesses to a will are dead, or from lapse of time do not remember the transaction after diligent production of all the evidence possible the law will, if the attestation is in due form, presume a proper execution of the will. *Butler v. Benson*, 1 Barb., 527; *Peck v. Cary*, 27 N. Y., 9; *Morris v. Kniffen*, 87 Barb., 336; *Matter of Griswold*, 15 Abb., 299; *Lawrence v. Norton*, 80 How. Prac., 232; *Orser v. Orser*, 24 N. Y., 51; *Price v. Brown*, 1 Bradt., 291.

Such presumption will have weight according to the known character of the deceased witness and his knowledge of what was requisite to the proper execution of such will. *Willis v. Mott*, 36 N. Y., 486; *Will of Humphrey*, *Tucker's Surr. Rep.*, 142; *Will of Smith*, *Tucker's Surr. Rep.*, 227.

And will be weaker when the subscribing witness signs by a mark, which is a sufficient subscription. *Morris v. Kniffen*, 87 Barb., 336; *Barnard v. Haydrick*, 49 Barb., 67.

When the subscribing witnesses fail to prove the proper execution of a will others may be called. *Butler v. Benson*, 1 Barb., 526; *Trustees v. Culhoun*, 25 N. Y., 423, reversing, 38 Barb., 148; *Prebles v. Cuse*, 2 Bradf., 236.

So the positive recollection of one of the witnesses will not be overcome by the non-recollection of the other. *Newhouse v. Goodwin*, 17 Barb., 286; *Tilden v. Tilden*, 13 Gray, 110.

Although, if all the proof fails to show that the testator in fact declared to one of the subscribing witnesses the will to be his last will and testament, probate should be refused. *Abbey v. Christy*, 49 Barb., 276.

An attestation in due form, with the other circumstances of the case, may warrant a jury in finding the due execution of a will against the evidence of the other subscribing witness; but would not, it seems, without regard to any extrinsic fact, support such a verdict against the positive evidence of a living witness. *Orser v. Orser*, 24 N. Y., 51.

It is not material which be first, the signature or the declaration, if both be done at the same time. *Kecney v. Whitmarsh*, 16 Barb., 141.

The witnesses must subscribe the will in the testator's presence. *Hindmarsh v. Charlton*, 8 House of Lords, 160, 1 Redfield on Wills, 244-251.

And producing a will to which one has improperly signed his name as a witness and declaring it to be such, is not a valid signing by merely correcting the former signature. *Hindmarsh v. Charlton*, 8 House of Lords, 160.

Although when the deceased lay in bed in one room, and the witnesses subscribed the will in an adjoining room where she could have seen them, it was held a signing in her presence. *Radford v. McDonald*, 1 Bradf., 352.

In the case if a blind person it is suf-

ficient that the witnesses sign the will in his presence and with his knowledge, so near him that he can, by the aid of his other senses ascertain their presence. *Ray v. Hill*, 3 Strob., 297; *Matter of Percy*, 1 Robertson (Eng.), 278, 1 Redf. on Wills, 250.

The testator must have completed his subscription and the witnesses theirs before the testator's death or the will is invalid. *Vernam v. Spencer*, 8 Bradf. 16.

So where a witness supposed only one was necessary and did not sign his own name until subsequently, when he did so; held invalid. *Ex parte LeRoy*, 3 Bradf., 227.

Though it is not necessary both should sign it at the same time or in the presence of each other. *Hoyersadt v. Kingman*, 22 N. Y., 372; *Willis v. Mott*, 36 N. Y., 497.

Where the testator is blind a will drawn in conformity with instructions given by him and properly executed will be held valid though not proven to have been read to the testator. *Edwards v. Fincham*, 4 Moore's Priv. Council, 198; *Weir v. FitzGerald*, 2 Bradf. Surr. Rep., 42.

Although in such case there should be some proof *aliunde* the will that the testator's mind accompanied the will. *Weir v. FitzGerald*, 2 Bradf., 42.

Where the testator is deaf, instructions for the will, the declaration that it is his will and a request to witness, it together with all the formalities, may be communicated by writing on a slate or by any other known and proper act indicating approval. *Gombault v. Public Admr.*, 4 Bradf., 226; *Moore v. Moore*, 4 Bradf., 265.

Although the court may require the party to whom instructions were given by signs to show what they were. In *re Owston*, 2 Swabey and Trist., 461; In *re Geale*, Id., 420.

[Law Reports, 2 Probate and Divorce, 455.]

Feb. 13, 1872.

*IN THE GOODS OF BROWN.

[455]

Administration limited to carry out a Suit in Chancery—Second Grant—Practice.

A grant of administration in the goods of a deceased limited to carry on proceedings in Chancery having lawfully issued and being still in force, the court will

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not revoke it in order that a general grant may be made to the party who in the first instance would have been entitled thereto. The proper course is to supplement the limited grant of administration of the rest of the goods of the deceased.

THOMAS BROWN, late of Hobart Town, Tasmania, died on the 25th of March, 1864; and on the 10th of December, 1866, Henry John Buckland, as curator of intestate's estates in Tasmania, was constituted sole personal representative of the deceased in that country. On the 20th of November, 1869, letters of administration of the effects of the deceased, limited to proceedings in the Court of Chancery in a suit of *Dunn v. Brown and Others*, and until a final decree were made in that cause were granted by this court to James Alexander and Philip Vanderbyl, as the nominees of Henry John Buckland. On the 8th of July, 1871, the Master of the Rolls, in a cause entitled *Salmon v. Dunn*, made an order for the payment out of court to James Alexander and Philip Vanderbyl, as the attorneys of Henry John Buckland, of a sum of 15,000*l.* standing to the credit of the suit, on their obtaining complete administration to the estate of Thomas Brown. On the 16th of January, 1872, on an affidavit that the limited administration granted on the 20th of November, 1869, had ceased and expired, and that Mr. Buckland was still the sole personal representative of the deceased in Tasmania, administration of the whole personal estate of the deceased was granted under 20 & 21 Vict. c. 77, s. 73, to James Alexander and Philip Vanderbyl, as the attorneys, and for the use and benefit of Mr. Buckland, the curator of intestate's estates in Tasmania, and as such the sole person authorized by the Supreme Court of Tasmania to act as the legal personal representative of the deceased; and until he should cease to hold that office, or until he should apply for and obtain letters of administration to be granted to him. It was subsequently ascertained that the limited administration granted on the 20th of November, 1869, had not ceased and expired.

Feb. 13. *Dr. Spinks, Q.C.*, moved the court to annul the grant made on the 20th of November, 1869, and to order a full grant of administration of the effects of the deceased in England to issue to Messrs. Alexander and Vanderbyl, as the attorneys of Mr. Buckland, and for his use and benefit.

LORD PENZANCE. The deceased died domiciled in Tasmania. He appears to have left a will, but the executors have renounced, and by an order of the Supreme Court of Tasmania, Henry John Buckland, curator of intestates' estates, has become the personal representative of the estate and effects of the deceased. These facts, without more, would have entitled the applicants.

as the authorized attorneys of Mr. Buckland, to obtain a general grant for his use and benefit, under the 73d section of the Probate Act. But the applicants applied for and obtained a grant limited to the carrying on of a suit in Chancery. It now appears, by the affidavit of Mr. Hughes, sworn on the 10th of November, 1871, that on the 8th of July, 1871, the master of the rolls made an order in another suit in Chancery for payment out of court of the sum of 15,000*l.* to the applicants as attorneys of Mr. Buckland on obtaining complete administration to the estate and effects of the deceased. The applicants, therefore, desire to have the limited grant revoked, and a general grant substituted. But this would not be in accordance with the practice of the court. It is the practice, when a limited grant has been made, to supplement it by a *cæterorum* grant. The effect of these two grants taken together, if made to the same person, is precisely the same as that of a general grant would be. For he who has first a part, and then the rest, has in fact the whole. There is, therefore, no end to be attained by revoking the first grant; and as it was properly issued, and is in no way defective, there is no proper ground for rescinding it. A *cæterorum* grant will, therefore, issue to the applicants.

Attorneys: *Masterman & Hughes.*

[Law Reports, 2 Probate and Divorce, 457.]

March 15, 1872.

*IN THE GOODS OF GRIFFITH.

[457]

Inconsistent Wills—Appointment of Executor not revoked—Probate of both wills.

A testator left two wills, containing different and inconsistent dispositions of his property. The first will appointed an executor, and the second did not revoke that appointment, and appointed no fresh executor, and contained no general words of revocation. With the consent of all parties probate of both wills, as together containing the last will of the deceased, was granted to the executor named in the first will.

THE deceased died on the 12th day of February, 1871, leaving the two following duly executed testamentary papers.

1. "This is the last will and testament of me, George David Griffith, of Berry Hill, in the parish of Nevern, in the county of Pembroke. I give and devise all my real and personal estate to my brother-in-law, James Bowen, of Troedyrour, and Dorothea his wife, their heirs and assigns, for ever. I appoint the

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said James Bowen sole executor of this my will, as witness my hand this 31st day of January, 1857.

"G. D. Griffith."

"Witnessed by us and in the presence of each other,

"Jane Bowen,

"Caroline James."

2. "This is the last will and testament of me, George David Griffith, late of Berllam, in the parish of Eglwysrw, in the county of Pembroke. I give and devise to my niece Anna M., daughter of my late sister Easter, wife of Benjamin Evans, £1000, to my sister Dorothea, wife of James Bowen, of Troed-yr-aur, £200, to my niece Mana £100, all the remainder to my niece Ellen. I hope Daniel will have something after me. I hope I shall be buried at Nevern, in the county of Pembroke. 15th June, 1857.

"G. D. Griffith,

"Daniel Mathias,

"Mana Davies.

458] *A caveat had been entered against proof of the will of the 31st of January, 1857, and it had been warned, and an appearance entered to the warning.

Searle, with the consent of all the parties interested under both the testamentary papers, moved for an order staying the contentious proceedings, and for a grant of probate of the two papers, as together containing the last will and testament of the deceased to James Bowen, the sole executor named in the first of the said papers. He cited *In the Goods of Leese* ⁽¹⁾.

The court made the grant on the authority of the case cited.

Attorneys: J. L. P. Eyre & Co.

[Law Reports, 2 Probate and Divorce, 459.]

April 18, 1872.

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*LINDSAY V. LINDSAY.

Conditional Will.

A mariner's will commencing, "Instructions to be followed if I die at sea or abroad," held to be conditional.

DECLARATION: That John Lindsay, late of 20, Upper Stanhope street, Liverpool, master mariner, deceased, who died on the 8th of August, 1871, at Dumfries, in Scotland, being of the age

(¹) 2 Sw. & Tr., 442.

of twenty-one years and upwards, made his last will and testament when on a voyage some time between the 6th of August, 1870, and the 28th of March, 1871, and in the said will appointed no executor and named the plaintiff, his widow, universal legatee; that the whole of the contents of the said will is in the handwriting of the said testator, and was reduced into writing and signed by him some time between the said 6th of August, 1870, and the 28th of March, 1871, when the said testator was at sea; and that the said testator was at the time of the making of the said will of perfect sound mind, memory, and understanding.

The defendants, the next of kin of the deceased, pleaded, 1. That the paper writing without date, alleged by the plaintiff to be the last will and testament of John Lindsay, was not written and signed by the said deceased when on a voyage at sea. 2. That the said alleged will was conditional, and the events upon the occurrence of which it was to take effect never occurred.

The plaintiff, in her replication, took issue on the first and second pleas, and further alleged that the will had been republished at sea. The defendants joined issue on this [460 replication, and the cause was heard before Lord Penzance without a jury.

Dr. Tristram, for the plaintiff; *O' Malley Q.C.*, and *Searle*, for the defendants.

The will propounded was as follows :

"Instructions to be followed if I die at sea or abroad : All my property, either money or valuables, or any money that may be due to me, or any money or other property that may belong to me as a right after death, I bestow on my wife, Franceschina Evelyn Cecily. This to be forwarded to my brother, David Lindsay, 86, Lodge lane, Liverpool. All money that he may have belonging to me he will forward to her, or do as she requires with it, for my sake, and that he will also assist, help, and protect her as far as he may be able, for the sake of his said brother.

"JOHN LINDSAY."

The plaintiff and other witnesses were examined in support of the will. There was evidence that it had been originally made at sea, but no evidence that it was ever republished at sea. It was proved that the deceased died at Dumfries from the effects of an accident whilst he was there on a visit with his wife and some of his relatives.

THE court held that, assuming the will to have been made at sea, it was clearly conditional, for the heading governed the

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In the Goods of Nicholls.

whole of the contents. The deceased not having died at sea or abroad, the events on the occurrence of which it was to take effect never occurred. If therefore pronounced against the will, but allowed the plaintiff her costs out of the estate.

Attorneys for plaintiff: *Walker & Mortineau.*

Proctors for defendants: *Johnson & Coote.*

As to the validity of a nuncupative will by a soldier or sailor; see *Botsford v. Krake*, 1 Abb. Prac. Rep., N. S., 112; *Leathers v. Greenacres*, 53 Maine, 561; 6 Am. Law Reg. N. S., 533; Id., 691-2, note; *Vandusen v. Estate of Gordon*, 39 Vermont, 111; *Matter of Smith's Will*, 6 Philadelphia Reports, 104. As to sustaining a gift by a soldier or sailor, *Irish v. Nutting*, 47 Barb., 370; *Dezheimer v. Gautier*, 34 How. Prac. Rep., 472, 5 Rob., 216.

(Law Reports, 2 Probate and Divorce, 461).

July 4, 1872.

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*In the Goods of NICHOLLS.

Administration to Married Woman — Evidence as to Survivorship of Husband — Presumption as to his Death after seven Years' Absence.

A married woman, whose husband was last heard of in 1853, died intestate in 1856. The court refused to grant administration to her next of kin without citing the husband or his representatives.

JANE CHAMBER NICHOLLS, the deceased, was a married woman, whose husband was convicted of felony in October, 1845, and sentenced to seven years' penal servitude. He was last heard of in Australia in the year 1853. Mrs. Nicholls died on the 15th of July, 1856, intestate. She was entitled to two legacies, subject to the life interest of her mother, Jane Dear, who died on the 19th of August, 1864.

June 26. *Dr. Tristram*, on behalf of one of the brothers and next of kin of the intestate, moved for a grant of administration to her estate and effects, without citing her husband or his representatives. They would not be entitled to the grant unless they could prove affirmatively that the husband survived the wife: *Satterthwaite v. Powell* ⁽¹⁾; *Underwood v. Wing* ⁽²⁾; *In the Goods of Wainwright* ⁽³⁾; *In the Goods of Ewart*. ⁽⁴⁾

Cur. adv. vult.

July 4. LORD PENZANCE. It was contended that the next of kin of the wife would be entitled to a grant in this case unless it could be shown by the representatives of the husband, if he

⁽¹⁾ 1 Curt., 705.

⁽²⁾ 1 Sw. & Tr., 257.

⁽³⁾ 4 D. M. & G. 683; 24 L. J. (Ch.), 293.

⁽⁴⁾ 1 Sw. & Tr., 258.

be dead, that he survived the wife, and some cases were cited in which the question of the survivorship of husband and wife were discussed. But those were cases in which the husband and wife had perished by drowning, or some other disaster, about the same period, and it was not possible to know which of them survived the other. The mode in which this court, and the courts of equity deal with such a state of things, is, to say that those whose claim is founded on the *survivorship [462 of either must prove it affirmatively. Thus, if the next of kin of the husband claim administration to the wife on the ground that he survived, they must produce evidence of the fact, and, conversely, if the next of kin of the wife claim the grant, they must show that she survived. Those cases have no application to the present case. The date of the wife's death is known. It is not positively known whether the husband is dead now. All that is proved is that he was last heard of in a foreign country in the year 1853. Thereupon the applicant claims the benefit of the presumption of law that by the end of seven years after he was last heard of he was no longer alive. That would carry his death down to 1860. If the presumption is to operate he must, therefore, have survived his wife. This seems to me to be the common case of a married woman, whose husband is entitled to represent her if he be alive, and whose husband's representatives are entitled to represent her if he be dead, and if he survived her. In this case the wife's next of kin have failed to show that she died a widow, and I think, therefore, the usual practice must be followed, and the husband, or his representatives, must be cited before the grant can be made as prayed.

Attorney: *Bell.*

(Law Reports, 2 Probate and Divorce, 462).

July 25, 1872.

PARFITT v. LAWLESS.

Testamentary Suit—Plea, Undue Influence only—Confessor and Penitent—Burden of Proof.

The plaintiff, a Roman Catholic priest, had resided with the testatrix and her husband many years as chaplain, and for a part of the time as confessor. He was confessor at the time the will in dispute was made. There was no evidence that the plaintiff had interfered in the making of such will, or that he had procured the gift of the residue to himself, or that he had brought such gift about by coercion or dominion exercised over the testatrix against her will, or by importunity not to be resisted. Moreover, it was not shown that even in the common affairs

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of life, in business, or in anything else, the testatrix was under the plaintiff's control or dominion :

Held, that there was no evidence to go to a jury on an issue of undue influence. Natural influence exerted by one who possesses it to obtain a benefit for himself is *undue inter vivos*, so that gifts and contracts *inter vivos* between certain parties will be set aside, unless the party benefitted can show affirmatively that the **463**] *other party could have formed a free and unfettered judgment in the matter; but such natural influence may be lawfully exercised to obtain a will or legacy. The rules therefore, of courts of equity in relation to gifts *inter vivos* are not applicable to the making of wills.

THE plaintiff, Rev. Charles Parfitt, D.D., propounded the will of Jane Conolly, of Cottles, near Bath, in the county of Wilts, widow, bearing date the 16th of July, 1862. The defendant, Philip Lawless, pleaded originally that the will was not executed in accordance with the requirements of the statute 1 Vict. c. 26, that the deceased was not of sound mind at the time of execution, and that, as regards the residue, the will was obtained by undue influence of the plaintiff. Subsequently the two first pleas were withdrawn. Mrs. Conolly's husband, who died in 1850, was possessed of a considerable estate called the Cottles estate, valued at 63,000*l.*, and other property. He left a life interest in it to his widow, and on her decease he bequeathed it to his son (by a previous wife), Charles John Thomas Conolly, absolutely; but in case his son died in the lifetime of the widow without issue, then the estate was to become hers absolutely subject to an annuity for life of £2,500 to the son's widow. Charles John Thomas Conolly died a few days before Jane Conolly, leaving a widow but no issue. The property, exclusive of the interest under her husband's will, of which the deceased died possessed was of the value of £7000. The will propounded was divided into two parts: by the first she disposed of the property she then possessed, and gave the residue thereof to the plaintiff; and in the second she referred to her interest under her husband's will, and in case she should come into possession of the Cottles estate she charged it with annuities to the amount of £740, and subject to such charges bequeathed it to the plaintiff. The plaintiff is a priest of the Roman Catholic Church, and from the year 1848 until her death resided with the deceased and her husband as domestic chaplain; for a greater portion of the time he also acted as her confessor. The question at issue was tried before Lord Penzance and a special jury on the 20th and 21st December, 1871. The defendant, upon whom the burden of proof lay, produced several witnesses, but the court held he gave no evidence to go to the jury. With the leave of the court his counsel then called the **464**] plaintiff and *examined and ultimately cross-examined him as a hostile witness, but the court still held that no sufficient case of undue influence to go to a jury had been offered,

and directed the jury to find a verdict for the plaintiff, which they did, and probate was granted of the will on formal proof of execution. On the 24th of January, 1872, before Lord Penzance, Mellor, and Brett, JJ., an application for a new trial was made on the ground of misdirection, and a rule *nisi* was ordered to issue, which came on for argument before Lord Penzance, Pigott, B., and Brett, J.

April 24, 25. *Denman, Q. C., Dr. Spinks, Q. C., Bayford*, for the plaintiff, showed cause against the rule. There was no evidence to go the jury. It is true the parties stood in relation to one another of confessor and confessed, but the plaintiff was not the maker of the will; and although he knew in 1858 that he had been appointed executor he was not aware that he was made residuary legatee until after Mrs. Conolly's death. It is, however, contended on the other side that where the relationship of confessor and confessed has been established, even although the testator be admitted to have been of sound mind and capable of making a will, and that the confessor had no part in the transaction, he is still bound to produce evidence in contradiction of undue influence; that is, to prove a negative.

[BRETT, J. They mean to say that when once the relationship is shown the burden of proof is shifted.]

Even in such a case the party setting up the plea must prove it by affirmative evidence; and, further, that the influence was exercised in reference to the particular will propounded. The most important case on this point is *Boyse v. Rossborough* (¹), in which it was laid down that to vitiate a will there must be coercion or fraud.

[LORD PENZANCE. The question here is, was there evidence to go to a jury? They say they established that the residuary legatee at the time of the execution of the will was the confessor of the testatrix, and that that fact, coupled with his position in the house, was enough to cast a burden upon the plaintiff to disprove influence, which he did not do; therefore, there was some evidence for a jury.]

*Such a presumption was rebutted by the evidence of [465 the plaintiff himself. The cases principally relied upon by the other side related to gifts *inter vivos* decided in the courts of equity; but, as regards wills, if there be capacity and a knowledge of business proved or admitted, and an expressed desire to do what was done, undue influence cannot be presumed from the mere position of the parties. It must be proved, and it must be an influence exercised in reference to the will itself.

[LORD PENZANCE. In *Boyse v. Rossborough* (¹) undue influence

(¹) 6 H. L. C., p. 2, at p. 47.

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is very carefully defined, and it is very doubtful whether the same meaning is attached to those words in the courts of equity. In testamentary cases it is always defined as coercion or fraud, but *inter vivos* no such definition is applied. Where parties hold positions in which one is more or less dependent upon the other, as tutor and pupil, guardian and ward, &c., the courts of equity hold that the weaker party shall be protected; and they set aside his gifts if he had not proper advice independently of the other. It is assumed he may have been overreached; that is far short of being coerced.]

Not only overreached, but denuded of his property in his lifetime. The courts of equity do not lay down a rule that the mere relationship is sufficient to invalidate the transaction, and that in no case a deed made between such parties shall be good. The case of *Boyse v. Rossborough* ⁽¹⁾ is the more important, as it was a proceeding in a court of equity, which would have applied the principles it acts upon *inter vivos* if they had been applicable.

[LORD PENZANCE. In the cases before the courts of equity there are only two parties before the court, one of whom must have been guilty of the fraud or influence, if there be any. In a testamentary contest the legatees may have had nothing to do with the making or execution of the will.]

Take the case of a medical man, who has not seen the deceased for months, and the will is made by an independent attorney, the principles of courts of equity would not be applicable. So again, as between a father and son, or two sisters of different ages, a court of equity in many cases might set aside deeds; 466] but it would *be absurd to avoid a will for undue influence by reason only of the relationship of the parties.

[They cited *Standen v. Edwards* ⁽²⁾; *Mountain v. Bennet* ⁽³⁾; *Norton v. Relly* ⁽⁴⁾; *Dent v. Bennett* ⁽⁵⁾; *Huguenin v. Basely* ⁽⁶⁾; *Williams v. Goude and Bennett* ⁽⁷⁾; *Barry v. Bullin* ⁽⁸⁾; *Jones v. Godrich* ⁽⁹⁾; *Kelly v. Thewles* ⁽¹⁰⁾; *In re Melcalfe's Will* ⁽¹¹⁾; *Nanney v. Williams* ⁽¹²⁾; *Waters v. Thorne* ⁽¹³⁾; *Ireland v. Rendall* ⁽¹⁴⁾; *Cleare and Foster v. Cleare* ⁽¹⁵⁾; *Atter v. Atkinson* ⁽¹⁶⁾; *Harrington v. Bowyer*. ⁽¹⁷⁾]

Digby Seymour, Q.C., *Ballantine*, *Serjt.*, and *Dr. Tristram*, for the defendant. If the relationship of confessor and penitent

⁽¹⁾ 6 H. L. C., p. 2, at p. 47.

⁽²⁾ 1 Ves. Jun., 133.

⁽³⁾ 1 Cox, C. C., 353.

⁽⁴⁾ 2 Eden, 286.

⁽⁵⁾ 4 My. & Cr., 269.

⁽⁶⁾ 14 Ves., 273.

⁽⁷⁾ 1 Hagg. Eccl., 577.

⁽⁸⁾ 2 Moo. P. C., 48.

⁽⁹⁾ 5 Moo. P. C. 16.

⁽¹⁰⁾ 2 Ir. Ch., 510.

⁽¹¹⁾ 2 D. J. & S. 122; 33 L. J. (Ch) 808.

⁽¹²⁾ 22 Beav., 452.

⁽¹³⁾ 22 Beav., 547.

⁽¹⁴⁾ Law Rep. 1 P. & M., 194.

⁽¹⁵⁾ Law Rep. 1 P. & M., 655.

⁽¹⁶⁾ Law Rep. 1 P. & M., 665.

⁽¹⁷⁾ Ante, p., 264.

exist, and during its continuance a will is made in favor of the confessor, and these facts are proved, such proof will be sufficient to support a plea of undue influence; and it will be for the other side to disprove by evidence the natural presumption arising from such a state of circumstances.

[LORD PENZANCE. Do you contend that, if a next of kin gives evidence that a disposition has been made in favor of A. B., a confessor, and upon that the party propounding the will gives no evidence in disproof of undue influence, the judge ought to instruct the jury to return a verdict against the will?]

The first proposition depends on another, namely, that there is a certain class of cases in which, on the ground of public policy, the Court of Probate will follow the precedents of the courts of equity in their dealings *inter vivos*, and more readily assume the existence of undue influence.

[PIGOTT, B. Does your proposition apply to any other person than a confessor?]

The second proposition does.

[BRETT, J. Does it extend to any spiritual adviser?]

*That depends upon the degree of influence he may exert. [467

[LORD PENZANCE. Do you confine it to spiritual influence one?]

That is also a question of degree. If the courts are watchful in transactions between guardian and ward, much more will they be so where the relationship is of a spiritual character. In *Boyse v. Rossborough* ⁽¹⁾ the relationship was that of husband and wife; and although that relationship leads the courts to be on their guard, it will not be to the same degree as in the other class, where the connection between the parties is of a fiduciary character, as between guardian and ward, physician and patient, or tutor and pupil. This class most nearly approximates to the present. In the case of *Boyse v. Rossborough* ⁽¹⁾ it is admitted that moral terror may be created sufficient to deprive one of his free agency; how much more may spiritual terror do so? In that case, too, stress was laid upon the absence of near relations. Here the testatrix was surrounded by relations and friends, whom she treated with great affection; and under these circumstances the fact that the will is inofficious itself indicates that the plaintiff must have interfered with the natural wishes of the deceased. Moreover, knowing the extent of her property, he ought to have awakened her mind to the claims of her relations. There was, indeed, direct evidence of the control of the plaintiff in restricting the actions of the deceased towards her relations and those about her; and if so, there was some evidence to go to the jury.

(1) 6 H. L. C., p. 2.

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[BRETT, J. In order that in such a case a fact shall be admissible as evidence it must be more consistent with the plea of undue influence than with any other hypothesis. It is not enough to show that it is equally consistent with either.]

The question is, whether there was any evidence at all. It is immaterial what was its strength; that was for the jury. If there was any such that a reasonable man could take it into his mind and form a judgment upon it, it ought to have been laid before the jury. It is notorious that a Roman Catholic confessor claims the highest authority over the conscience and actions of the penitent, and such influence is progressive, and cannot be shown at any particular moment. It is impossible to account 468] for *the plaintiff taking so large a share of the testatrix's property except on the suggestion of undue influence. The bequest shows a morbid feeling, and there can be no doubt who raised that state of mind. The plaintiff was the best person to explain the transaction, and he gave his evidence in an evasive way. Was not that a ground to leave the case to a jury?

[They referred to 2 Burge, Conflict of Laws, 487; *Hunter v. Atkins* ⁽¹⁾; *Hoghton v. Hoghton* ⁽²⁾; *Von Stentz v. Comyn* ⁽³⁾; *Gore v. Gahagan* ⁽⁴⁾; *Ingram v. Wyatt* ⁽⁵⁾; *Panton v. Williams* ⁽⁶⁾.]

Cur. adv. vult..

July 25. LORD PENZANCE. This rule was granted in order to consider a suggestion strongly pressed that the rules adopted in the courts of equity in relation to gifts *inter vivos* ought to be applied to the making of wills. In equity persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favor of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. Applying this view of the subject to the making of a will, it was contended in this case that it was enough to show that a legatee fell within the class enumerated, and that, having done so, the onus was cast upon him of proving that his legacy was not obtained by undue influence. It would be an answer to this argument to say that this has never been, and is not the law in

⁽¹⁾ 3 My. & K., 113.

⁽²⁾ 15 Beav., 278; 21 L. J. (Ch.), 482.

⁽³⁾ 12 Ir. Eq., 822.

⁽⁴⁾ Milw. Eccl. Ir., 217.

⁽⁵⁾ 1 Hagg. Eccl., 384.

⁽⁶⁾ 2 No. of Ca. Suppl., 21.

this or any other court regarding wills ; and that, if this court should presume to make a new law on the subject, it would establish one rule in regard to personalty, while another *would remain the existing rule in regard to realty. [4 9 “ One point, however, is beyond dispute,” said Lord Cranworth in *Boyse v. Rossborough* ⁽¹⁾, “ and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed.” But in truth the cases in equity apply to a wholly different state of things. In the first place, in those cases of gifts or contracts *inter vivos* there is a transaction in which the person benefitted at least takes part, whether he unduly urges his influence or not ; and in calling upon him to explain the part he took, and the circumstances that brought about the gift or obligation, the court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have, and in point of fact generally has, no part in or even knowledge of the act ; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not most cases, he could not possibly discharge. A more material distinction is this : the influence which is undue in the cases of gifts *inter vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* it is considered by the courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore, set aside unless the party benefitted by it can show affirmatively that the other party to the transaction was placed “ in such a position as would enable him to form an absolutely free and unfettered judgment :” *Archer v. Hudson*. ⁽²⁾

The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands *what he is doing, and [470 is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a

(1) 6 H. L. C., at p. 49.

(2) 7Beav., 551.

recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another.

The influence which will set aside a will, says Mr. Justice Williams, "must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear." Williams' Executors, pt. 1, bk. 2, ch. 1, § 2. This difference, then, between the influence which is held to be undue in the case of transactions *inter viros*, and that which is called undue in relation to a will or legacy is all-important when a question arises of making presumptions or adjusting the burden of proof. For it may be reasonable enough to presume that a person who had obtained a gift or contract to his own advantage and the detriment of another by way of personal advice or persuasion has availed himself of the natural influence which his position gave him. And in casting upon him the burden of exculpation, the law is only assuming that he has done so. But it is a very different thing to presume, without a particle of proof, that a person so situated has abused his position by the exercise of dominion or the assertion of adverse control.

For these reasons it seems to me that it would be improper and unjust to throw upon a man in the position of the plaintiff, without any proof that he had any hand whatever in the making of this will, the onus of proving negatively that he did not coerce the testatrix into devising the residue of her land to him. I say coerce, for this is the only matter involved in a plea of undue influence. Lord Cranworth appears in the case above cited to have regarded fraud as a species of undue influence. It is a mere question of terms; but by the rules of pleading established [471] in this court since December, 1865, fraud, which includes misrepresentation, is the subject of a separate plea, and undue influence as a term used in a plea in this court raises the question of coercion, and that only.

I now proceed to examine the evidence, upon the assumption that the defendant was bound to prove the issue he raised, and that it was necessary for him to establish affirmatively by such evidence as the jury could reasonably act upon, that the residuary clause of this will was obtained by the coercion of the

plaintiff. And upon this assumption the question is, Whether the evidence which the defendant gave ought to have been submitted to the jury? The argument on this head betrayed, I think, some confusion as to the nature and limits of the question, whether there is in any case evidence for the jury. For instance, it was urged as each separate fact or piece of evidence came to be commented upon, that it was not for the court but the jury to assign its due value to such fact or evidence. If this were so it would be unjustifiable for the judge in any case to withdraw the evidence, however slight, or even irrelevant, from the jury. For to ascertain that it is slight or irrelevant the judge must assign a meaning and a value to it, and this might not be the same value or meaning which it would bear in the eyes of the jury. I conceive, therefore, that in judging whether there is in any case evidence for a jury, the judge must weigh the evidence given, and must assign what he conceives to be the most favorable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.

Again, it was argued that there were certain facts in this case calculated to give rise to serious suspicions, and it seemed to be contended that any conclusions which might suggest themselves by way of suspicion merely, however vague, might properly, if the jury pleased to indulge in them, form the basis of a verdict; and consequently that if facts were proved calculated to generate such suspicions, enough had been done to make a case fit to go to the jury. If this proposition were correct, it would follow that the defendant had nothing more to do in a case like the present than to prove that the plaintiff was a Catholic priest, that he was the confessor of the testatrix, and that she had made him her residuary *legatee. For, upon this basis of fact, suspicion freely indulged and directed by eloquent comment might easily build up the fabric of undue influence or even fraud. It is not intended to be said that he upon whom the burden of proving an issue lies is bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved legitimate and reasonable inferences may, of course, be drawn, and all that is fairly deducible from the evidence is as much proved for the purpose of a *prima facie* case as if it had been proved directly. I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.

I have been thus far particular in endeavoring to draw the line between that which rests upon proof, and that which rests upon suspicion only; because in this case I thought the defendant's argument wholly confounded them. The propositions which he was bound to give reasonable evidence to establish were these; that the plaintiff had interfered in the making of the will, that he had procured the gift of the residue to himself, and that he had brought this about not by persuasion and advice (for that would be perfectly legal), but by some coercion or dominion exercised over the testatrix against her will or by importunity so strong that it could not be resisted. I have looked through the evidence in vain to find reasonable proof of any one of these three propositions. As regards the making of the will the defendant took a most unusual course. For the sake of having the first and last word with the jury, he withdrew the pleas which would have put the plaintiff on proof of the will, and gave no evidence of its execution himself. The consequence was that the attorney, who received the instructions from the testatrix, who made the will, and who, it must be presumed, knew the circumstances under which it was made, and the reasons upon which the testatrix acted so far as she allowed them to be known, was not called as a witness; nor were the attesting witnesses, nor was their place supplied by any other evidence. The making of the will and everything connected with 473] *it was left an absolute blank. Literally the only proof which was offered to show that the plaintiff had anything to do with it consisted in the fact that he was in London about the time that the will bears date, that he and the testatrix were seen together at the house of a relation of his, and that they were also seen at the exhibition. Whether the plaintiff knew what the testatrix had done for him in the will, is a point to which much cross-examination and much argument was directed. He denied it, but admitted many things from which a doubt of his denial may be inferred. But in my mind this matter is immaterial. The fact of his knowing the contents of the will after it was made is some proof that he was in the testatrix's confidence, but it has no tendency, as it seems to me, to support the conclusion that he had himself interfered in the making of it.

It is at this point of proving the plaintiff's interference that the evidence wholly fails. But that I may not do the defendant any injustice, I will recapitulate the whole of what was proved on this head. The plaintiff was the confessor of the testatrix. He knew, from what she told him, that she probably had power over the disposition of the estate in case of her stepson's death before her, and advised her to consult a lawyer. She asked for the name of the Roman Catholic bishop's attorney,

and he told her. This attorney was the person who afterwards in London made the will. She told the plaintiff at some time that she had made him her executor, and had given him full powers. He remonstrated against his being her sole executor, to which she replied, "You villain! whom else have I to trust?" The plaintiff admitted that he had heard that Mr. Cooper, also a Roman Catholic priest, was originally intended to be executor and residuary legatee, but that he (the plaintiff) had been put in his place. The testatrix mentioned to the plaintiff from time to time legacies that she wished paid, and the plaintiff made entry of them on a piece of paper in Greek characters, that they might not be read by any one about the house. Those legacies were not inserted in the will of 1868, which was made after two of them at least had been thus noted by the plaintiff. There is not a single fact in this enumeration, as it seems to me, which is not quite as consistent with the testatrix having told the plaintiff what she had done, after she had done it, as with *the plaintiff having had any hand in doing it; and it [474 would, I think, defy ingenuity to demonstrate that from any one of these facts a reasonable or logical conclusion could be drawn that the plaintiff had a hand in making the will.

But if the evidence fails thus signally to establish the first proposition, with what pretense of reason can it be held to support this much larger proposition, namely, that the plaintiff not only advised the residue to be left to himself, but forced this disposition upon the unwilling testatrix? And yet that is what the defendant has undertaken to prove. No amount of persuasion or advice, whether founded on feelings of regard or religious sentiment, would avail, according to the existing law, to set aside this will, so long as the free volition of the testatrix to accept or reject that advice was not invaded. And what, it must therefore be asked, is the proof that any attempt ever was made to control her free will? There was not a fact, a word, or an event proved which showed that on any occasion the testatrix had subordinated her own will to that of the plaintiff. It was stated, indeed, that he managed her affairs for her; but even this was confined to the last three years of her life, many years after the date of the will, and at a time when her health had failed. But of evidence to show that, in the common affairs of life, or in business, or anything else, she was under the plaintiff's dominion, there was an absolute and total dearth. The only fact that pointed to her having been ever controlled by anybody in anything was this, that when asked by Miss O'Rourke why she did not tell Mr. De Ruffiere that she had power to devise the estate, she replied, "They won't let me." At this time she had consulted her attorney, Mr. English, and

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perhaps Mr. Ward, and she had been in communication also with her stepson, Mr. Conolly, for he spoke of what he expected she would do with the property; and for aught that is known she had consulted other persons; and yet these words, "They won't let me," were argued to establish the following chain of reasoning. Some one had told her not to tell Mr. De Ruffière: therefore the plaintiff was the person who had done so. She wished to tell Mr. De Ruffière; therefore the person who gave the advice controlled her. If he controlled her in this, he must have controlled her in all other things; therefore he controlled 475] her in making a will; therefore *he controlled her in leaving the residue to himself. Unless this reasoning is satisfactory, there is not only no evidence of this control, upon which everything turns; but there was hardly an attempt to establish it. The plaintiff had lived in the house with the testatrix for years, and any control of his over her, if it existed, must have been visible to servants or some of the numerous friends who visited at the house. The defendant himself and his wife were called as witnesses, and had been frequently visiting at the house; and yet no question was asked them on the subject. Miss Martin, a friend and visitor, was also called, but not a question was asked her upon it. The only other witness was Miss O'Rourke. She had lived a year with the testatrix in 1856, visited her again for weeks in 1860, again in 1862, and again in 1866; and even of her no questions were asked by the defendant's counsel as to any dominion exercised in anything, however serious or however trivial, by the plaintiff. But she was cross-examined upon it, and then she said the testatrix was a clever person, who had a pretty firm will of her own, and that she never saw anything which led her to believe that the plaintiff ever induced her to do anything which she did not wish to do of her own accord. No other visitor, friend, or servant was produced, and the case was actually closed without a question being put by the defendant's counsel to any witness as to the existence of a dominating influence on the part of the plaintiff over the testatrix, either in her testamentary dispositions or anything else. Then in the last resort the defendant called the plaintiff himself, and was allowed to cross-examine him; and, strange as it may appear, no instances or occasions were put to the plaintiff on which he was alleged to have controlled the testatrix, and he was allowed to leave the witness-box without being challenged to admit any facts from which the habitual exercise of dominion might be inferred. Unless, therefore, it is just and right to conclude in all cases that a Roman Catholic priest, holding the position of confessor, must be held to possess and exert over those whom he confesses such a dominion as to

extinguish their free will in the disposition of their property, there were no materials, in my opinion, from which such a conclusion could be drawn in the present case, and therefore no evidence for the jury.

*There remains one fact to be noticed. The testatrix [476 is proved to have told her niece, Miss O'Rourke, that if she wished to leave money for the saying of masses, or other purposes of religion, she must not express her trusts in her will, but leave the money to her confessor, and tell him privately what she wished. This statement greatly strengthens the suspicion to which the general facts of the case are calculated to give rise, that this devise of the residue to the plaintiff was in reality accompanied by some secret trust for religious purposes. Whether there be such a trust in this case it is not for this court to investigate. Whether the possibility of such trust existing, and eluding the power of courts of justice to drag them to light, ought or ought not to induce the legislature to place any new restraints upon bequests or devises for ministers of religion it is not for this court to suggest, still less to assert. But one thing is plain; if this testatrix really did intend her property to be applied for the saying of masses, or for charities or other religious objects, and confided in her confessor to see that her objects were attained, she was, in the making of this will, carrying out her own wishes; she was intent on achieving an end of her own for the ease of her own mind, and was obeying the impulses of her own religious faith, all of which is hardly consistent with the notion of her having acted under the dictation of another.

The rule will be discharged with costs.

[His lordship further stated that Mr. Justice Brett concurred in this judgment entirely, both in reference to the law and as to the facts, and that Mr. Baron Pigott also concurred, but with hesitation. He regarded the whole case as full of suspicion and mystery. His doubts arose only as to the effect of the evidence, and he quite agreed in the directions it contains on the point of law.]

Rule discharged (1).

Attorneys for plaintiff: *Norris & Son.*

Attorneys for defendant: *Mason & Withall.*

(1) See next case.

[Law Reports, 2 Probate and Divorce, 477.]

[IN THE PREROGATIVE COURT OF CANTERBURY.]

June, 1850.

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*ASHWELL v. LOMI.

Testamentary Suit—Undue Influence—Physician and Patient.

Although there is no rule of law which forbids a man to bequeath his property to his medical attendant, yet it is not a favorable circumstance for one in such a confidential position, with respect to a patient labouring under severe disease, to take a large benefit under such patient's will, more particularly if it be executed in secrecy, and the whole transaction assumes the character of a clandestine proceeding. In such a case the onus will lie very heavily upon the party benefited to maintain the validity of the will.

This was a cause of proving in solemn form of law the last will and testament with a codicil thereto, of Eliza Lomi (wife of Mark Lomi, M.D.), of Carlton Villas, Maida Vale, Middlesex, dated respectively the 9th of October and the 4th of November, 1847, promoted by Samuel Ashwell, M.D., the sole executor named in the will, against Mark Lomi, the lawful husband of the deceased. The opposition was founded on charges of incapacity of the deceased, and of undue influence exercised over her by Dr. Ashwell,

The case was argued in June, 1850.

Dr. Addams and Dr. Harding appeared for Dr. Ashwell.
Dr. Bayford and Dr. R. Phillimore, for Dr. Lomi.

Cur. ado. vult.

August 3d. SIR H. JENNER FUST. The deceased in this cause, Mrs. Eliza Lomi, died on the 7th of April, 1848, leaving considerable property, over which she had a power of disposition. The bulk of her property was derived from her two brothers, Messrs. George and Thomas Walker, who predeceased her. At the time of her death she had no relations, and but very few friends. The property of the deceased consisted, as far as the court can collect, at the time of her marriage with Dr. Lomi, in 1828, of a sum of 1000*l.* in her own hands, and of 3000*l.* vested in her brother as trustee for her for certain purposes. By the settlement made at the marriage these two sums were to become, under the circumstances which have occurred (the death of Mrs. Lomi, without issue) absolutely the property of Dr. Lomi. By the will of Mr. G. Walker, dated 1834, a sum of 120*l.* Long Annuities was bequeathed to the deceased, but was not expressed to be for her separate use; and by the will of Mr. T. Walker, who died in April, 1845, a very considerable addition was made to her property, amounting to about 22,000*l.*, and it was devised to her for sole and separate use—in fact, it was placed entirely at her own disposal. The deceased appears to have made several testamentary dispositions of her property. The first bears date in the year 1831, and is in her own handwriting. By it she gives the whole property which she then possessed, or of which she might become possessed, to her husband. On the 15th of May, 1847, she executed another will, by which she made a provision for two of her servants of the name of Blackwell, gave a legacy of 100 guineas to Sir C. Scudamore, her medical attendant, and the residue of her property to 478] her husband. She appointed *Sir C. Scudamore and Mr. King her executors. This will remained uncancelled and unaltered until October following. Upon the 7th of October another will was executed by the deceased, by which she made a somewhat different provision for her confidential servants, gave to her husband her English bank stock, which amounted to 2700*l.*, and also the Long Annuities; to Mr. Penny 5000*l.*; and appointed Dr. Ashwell, her then medical attendant, sole executor; but she did not dispose of the residue of her property. On the 9th of October, two days afterwards, she executed another will

for the purpose, it was suggested, of correcting and supplying that deficiency; and by it, after giving the same legacies as before, she appointed her executor, Dr. Ashwell, residuary legatee. On the 4th of November she executed a codicil by which the bequest of the English bank stock to her husband is revoked; and referring to the residue, she states her intention to be that, whatever its amount, it should pass under the residuary clause of her will of the 9th of October, 1847; so that by this instrument the interest of her husband under the will was considerably diminished, and that of Dr. Ashwell proportionately increased. The will of October, 1847, and the codicil of November, 1847, are the papers propounded in this cause by Dr. Ashwell as executor, and are opposed by Dr. Lomi, the husband of the deceased, and the residuary legatee in the will of the 15th of May, 1847. The question, therefore, to be determined is, whether the will of October, 1847, and the codicil of November, 1847, are proved to have emanated from a capable testatrix, freely and voluntarily acting. It is here to be observed that Dr. Ashwell, who takes an interest under these papers of at least 10,000*l.*, was the medical attendant of the testatrix, who had long been suffering under a very severe malady in a very aggravated form, and was much reduced as to her bodily state. Under these circumstances the onus lies upon him, and lies pretty heavily, to maintain the validity of these papers; for although there is no rule of law which says that no person may bequeath his or her property to a medical attendant, yet it is not a favorable circumstance, undoubtedly, for one in such a confidential position with respect to a patient laboring under severe disease, to take a large benefit, more particularly when the will is executed with secrecy, and the whole transaction assumes the character of a clandestine proceeding. The case set up on behalf of the husband, in opposition to the will, is that the disorder under which the testatrix was suffering had produced, not only a very great effect upon her body, but that it had impaired her mental capacity; that such is the tendency of the disorder, that the remedies prescribed for her had also a tendency to becloud the faculties—to impair the mind even to a greater degree than the disease itself; that the testatrix was under the undue influence, control, and custody of Dr. Ashwell, and under a kind of duress; and that therefore she was not a free and voluntary agent in the transaction in question. On the other hand, it is alleged that, whatever may have been the tendency of the disorder, it was not such as was ascribed to it by the other side; that the deceased to the latest period of her life retained her mental faculties in a perfect state; that at no time during her whole life were there any symptoms of impaired mental faculties, or of that clouding of the mind alleged by Dr. Lomi; that the execution of the will and codicil were free and voluntary acts; that she knew and understood, not only the contents of the instruments she executed, but the effect they would have on her property; and that she desired, as she expressed herself that Dr. Ashwell, should have a handsome *portion for himself for the [479 kindness and attention he had shown her.

Again, it was alleged by Dr. Lomi that he had always lived on terms of great affection with his wife from the time of their marriage until the year 1847. This was denied by Dr. Ashwell, who asserted that after 1834 they ceased to occupy the same bed, and had separate apartments, inferring that they had done so in consequence of the aversion and dislike which the deceased then entertained towards her husband. I have already said that in 1831 the deceased made a will by which she left all her property, if she had any separate property, to her husband. At that time, therefore, there is no reason to suppose there was any diminution of the mutual affection which led to their union. Again, in 1834, on the death of her brother, Mr. George Walker, she wrote a letter to her husband, who was then in Italy. That letter is now before the court, and the whole style and tenor of it shows that she had a great affection for her husband. During the years from 1834 to 1842 Dr. and Mrs. Lomi resided with Mr. Thomas Walker another brother, who was dangerously ill, and who was attended by a Mr. Goodeve as a medical attendant; Mr. Goodeve speaks to the affectionate manner in which the deceased and Dr. Lomi lived during that period. Mrs. Lomi was devotedly attached to her brother, and required every one about her to render him assistance. Dr. Lomi co-operated readily and heartily with her, and she was sensible of it. She frequently expressed herself to Mr. Goodeve in terms of grateful sat-

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isfaction of Dr. Lomi's conduct towards her brother. There is one other fact in Mr. Goodeve's evidence I may refer to, namely, that at this time Mrs. Lomi was suffering from a painful disorder which would have rendered the occupation of the same bed with her husband, if not impossible, at least highly improper. Mr. Goodeve's evidence is corroborated by Mr. Brooke Smith, a solicitor employed by Mr. Thomas Walker, and on the whole I am satisfied that up to 1845, although the parties occupied separate beds and separate apartments, the strongest degree of affection subsisted between them. It is, however, true that in 1845, after the death of Mr. Thomas Walker, there was a coolness, and, perhaps, something more, between Dr. and Mrs. Lomi. Mrs. Lomi was then at Brighton, and Dr. Lomi in Italy, where he remained until March, 1846. It is proved by witnesses that Mrs. Lomi did express herself in strong terms as to the absence of her husband. She contended that he went abroad, and was staying away to avoid the execution of some deeds by which the property which had come to her from her brothers was to be secured to her for her separate use. If she had then made a will to his prejudice it would not have been inconsistent with the state of her feeling towards him. On the return of Dr. Lomi from Italy the deeds were executed, and I do not believe that Dr. Lomi absented himself for the purpose suggested. The deeds having been executed, Mrs. Lomi said that as he had complied with her wishes she would make a provision for him, but not to give him the whole of her property to be spent abroad. Here, then, I say is evidence of reconciliation between the parties. They lived together in the same house, although occupying separate apartments, as they had done before, and continued to live on terms which show that there was no real estrangement between them. In 1844 Mrs. Lomi was attended by Dr. Wallis, a physician at Bristol, for the same malady for which Mr. Goodeve had attended her, and he continued to attend her until January, 1847. He was succeeded by Sir Charles Scudamore. Both these gentlemen speak to the regard and affection which subsisted between Dr. and Mrs. Lomi, the affectionate attendance *of Dr. Lomi upon his wife, and his kindness to her, and her apparent gratification at the manner in which he conducted himself towards her. There were other witnesses produced to speak on this point, into the particulars of whose evidence it will not be necessary to go. It will be sufficient to say that in their opinion Dr. Lomi did everything that was right and proper towards his wife, and that she was grateful for his attention and conduct. Under these circumstances the disposition which she made of her property by the will of the 15th of May, 1847, was not improbable. On the 14th of May she had a violent return of her disorder, which caused her great alarm, as she thought she was going to die. She applied to Sir C. Scudamore to recommend to her a solicitor, and he named a Mr. King. By some error the letter addressed to him was delivered at the office of another solicitor of the same name. Mr. Comyn, the partner of this latter gentleman, who was absent at the time, attended upon Mrs. Lomi and took her instructions for a will. He says, "My inquiry as to the power whence she derived a right to make a will, being a married woman, led to the production of the settlement, which she had in bed with her, and put into my hands. I satisfied myself on that point by reference to it. As I recollect now, I read the material parts, or some of them, to her at the time. The instructions were very simple. She desired to make provision for her servants; the amount of that being settled, and she having mentioned her wish to leave a legacy of 100 guineas to Sir Charles Scudamore, I asked her if there were any other legacies that she desired to leave, and to whom she would give the residue. She replied that she had not another friend in the world, and that after what she had directed as to the servants and Sir Charles Scudamore all the rest was to be given to her husband. My impression from what she said of him was, that she was not living on the best of terms with her husband. I do not remember the particular expression she used in speaking of him. I do not mean that she made any direct complaint against him, or that she expressly said anything against him; it was rather that what she said led me to believe so. I inferred it was so. She did distinctly say that as she had not another relation or friend in the world, he, as her husband, was the most proper person to take the residue of her property." Now this will was executed, and remained uncanceled until October, 1847. It remained in the possession of the deceased until June, 1847, when it was

sealed up and given to Sir Charles Scudamore, in whose custody it remained until the 11th of October. It is said it is very improbable that the deceased should have adhered to that will. I confess it does not appear to me that there is any great improbability, when I consider the circumstances in which the deceased was. Her two brothers were dead, and, so far as the court can trace, she had no relation surviving; she had no intimate friends. The only person who at all at this time could have any claim upon her was Mr. Penny, to whom in the will propounded she gives 5000*l*. At this time she was scarcely acquainted, if at all, with Dr. Ashwell. I therefore consider there would have been nothing improbable in the deceased adhering to this will; for, looking at the terms on which Dr. and Mrs. Lomi then lived, there was no reason why the deceased should alter the disposition she had made in favor of her husband. According to the evidence of her servants, the Blackwells, the deceased's dissatisfaction with this will commenced very early, for even on the day on which it was executed, or on the day afterwards, she expressed her determination to make another will and provide for other persons. Nevertheless, she retained possession of the will until [481 the beginning of June, that is, for a fortnight or three weeks after she had executed it, and then delivered it up sealed to Sir Charles Scudamore, the executor appointed therein.

Now I confess it appears to me somewhat strange that the deceased should have expressed dissatisfaction with the will, and a determination to make another, and yet that no steps should have been taken for that purpose until the following October. If anything had happened to her in the interval Sir Charles Scudamore would have acted as executor, and her husband would have taken the whole of her property subject to the provision for the Blackwells, and the legacy to the executor. It does, to my mind, appear that she was not much dissatisfied with the provision she had made for her husband and servants, or she would have taken measures to alter the dispositions earlier than October. Dr. Ashwell was introduced to the deceased two days after this will was executed, namely, on the 17th of May, 1847. On that day he saw her, having been recommended by Sir Charles Scudamore. For some time the two gentlemen attended the deceased together, but afterwards Dr. Ashwell became the sole medical attendant. Sir Charles Scudamore left town for Buxton, having parted on good terms with the deceased. On his return he called upon the deceased, but she refused to admit him to the house, and he never saw her again. Dr. Ashwell became the sole medical attendant on the 4th of July, 1847, and attended the deceased very assiduously, undoubtedly, but I do not suppose more frequently than the nature of the disorder required. Mrs. Lomi apparently took a favorable view of Dr. Ashwell's skill and ability in the treatment of her disorder, and he became a great favorite. The conduct, however, of Mrs. Lomi towards her husband, and the sense she entertained of his attentions to her remained unchanged until the month of August following, when they removed to Carlton Villas, Maida Vale. Shortly after that there certainly did appear to have been a change of conduct and feeling towards him. Before that he went into her bedroom frequently — indeed, whenever he thought proper to do so. Those who saw them together in Clifford street and Norland square thought he was a kind and attentive husband. When they removed from Norland square to Carlton Villas he carried her down stairs to the carriage. There does not appear to have been any cause of offense given by Dr. Lomi; nevertheless, after they arrived at Carlton Villas, there was a diminution of confidence towards him. He was no longer suffered to have free access to his wife's room, but he was to go at certain fixed periods; and after some time (the exact date does not appear) the door of the room was locked, and access thereto was cut off, except with the consent of Mrs. Lomi and the Blackwells, who were in constant attendance upon her. Until the removal to Carlton Villas nothing had been done in reference to the alteration of the will of the 15th of May, 1847. Mrs. Blackwell deposes as to the commencement of the transaction as follows: "About the 3d of October I first heard the deceased speak to Mr. Ashwell about the will. I do not know what makes me remember the date, but I think it was about the 2d or 3d of October. The first time, she said to him in my presence and hearing that she was going to ask of him a great favor; that she was going to make a will, and she wished him to be exe-

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cutor, and that there was no one else in London she could ask. Dr. Ashwell told her that it was a serious thing for a physician, in full practice like him, to do, and that she must therefore allow him until the following day to think of it. I do not remember that she expressed any dissatisfaction with her then **substantiating** *will, or that she said anything at all about it at that time. Then, the next day, after the medical inquiries had been answered, the deceased, in my presence and hearing, asked Dr. Ashwell if he would do what she had asked him the day before, and added, 'I mean you to be sole executor, which will be less trouble, sir.' There is no allusion in this conversation to the point, whether if appointed executor, he was to have the residue of the deceased's estate. "And Dr. Ashwell then said that he would on one condition, and that was, if she wrote the will herself." Now, if he was merely to be appointed executor, that was a precaution which was hardly necessary; but if he imagined that in being appointed executor, he should be entitled to the residue (which seems, from what subsequently occurred, to have been the notion of both deceased and himself), then one can easily understand the precaution taken, and not by any means improperly shown. "And she said she was afraid she was too weak to do it; and he said that she might do a little one day and then a little another; and she agreed to do it. The same afternoon preparations were made for drawing up the will on the following day; the paper was ruled for her, and upon the 6th of October, I think, Mrs. Lomi proceeded to write a portion of the will down to two-thirds of the first side of the paper, finishing with the words 'two full suits of mourning.' The next day she finished it. I do not think she wrote the last words and 'residuary legatee' not until after it had been shown to a lawyer, as I will presently depose. I do not recollect the deceased executed this paper in the presence of two witnesses. The names which appear subscribed thereto are the names of two shopkeepers. I only recollect their coming twice, once when they witnessed the will prepared by the lawyer, and the other when they witnessed the codicil." Blackwell confirms the evidence of his wife, and adds, that he got the witnesses to sign the paper at the request of Mrs. Lomi. It is quite clear, from the whole of the circumstances from the beginning to the end, that everything in reference to this will was to be done behind the back of Dr. Lomi. He was to know nothing at all of what was going forward, either of the desire of the deceased to make a new will, or even that her mind was floating in respect of the disposition of her property. He was kept in entire ignorance of what was being done. The witnesses were procured by Blackwell. The druggist, who was first mentioned as a respectable person, was objected to because Dr. Lomi was in the habit of going to his shop, and it was thereby possible, if not probable, that a disclosure would be made to him. There is no objection to be made to the witnesses called in, they were respectable persons, but were perfectly unacquainted with the deceased, although articles had been supplied from their shops to the house. They both declare that they had no suspicion that anything was going on which affected the interests of the husband; indeed, they did not know of his existence. Blackwell deposes that the testatrix told him to get the witnesses while Dr. Lomi was from home, because she did not wish him to know anything about her altering her will. Here is the first step in the clandestine proceedings. The witnesses, upon this as upon other occasions, were to be smuggled into the house during the absence of Dr. Lomi; his going out and coming in was to be watched to prevent his having a suspicion of what was going on. Neither of the witnesses knew the deceased, they had never seen her. They did not know the contents of the will, nor did they know she had a husband, to whose prejudice the will might possibly operate. They were called upon to attest the execution **of a** *will by a lady, who was in a languid state, but not, as far as they could see, in any other than a fit state to execute such a document. The will was accordingly executed in their presence on the 7th of October, and they attested it. At that time the dispositive part of the will appointed Dr. Ashwell executor, but not residuary legatee. Indeed, that did not appear necessary either to the mind of the deceased or to Dr. Ashwell, for they believed that as executor he would take the residue of the property. He was, however, directed by the deceased to show the will to a solicitor, in order that the solicitor might see whether it would carry her intentions into effect. Dr. Ashwell consulted a solicitor named Mat-

thews, with whom he had some acquaintance, having attended his family professionally. It is important that the communication between Dr. Ashwell and Mr. Matthews should be well looked at and considered, for it is upon his evidence and that of the Blackwells that the case depends. Mr. Matthews says, "I perused the will in his (Dr. Ashwell's) presence; and having done so, I told him that though it was a very informal document, I thought it would be operative, so far as it went, but that as no mention was made of the residue, whatever residue Mrs. Lomi possessed, was not disposed of; and whatever her intentions may have been, he (Dr. Ashwell) under the will, as it stood, would not take such residue. Dr. Ashwell had told me in the earlier part of the interview that Mrs. Lomi was in a very critical state, that she was the wife of Dr. Lomi, with whom she lived unhappily, and from whom, as regarded connubial intercourse, although they lived in the same house, she had been separated for a long period—I think he said some years. And in regard to the will, he explained to me that Mrs. Lomi had, in the first instance, asked him to be her executor, which he had hesitated to do, but that on being pressed, and after taking time to consider, he had assented; that, afterwards, upon her giving him the will, he had learned from her, to his great surprise, that under the will he was to take the residue of her property." According to this account, Dr. Ashwell had consented to act as executor before the deceased had expressed any intention that he should take the residue of her property. "Dr. Ashwell told me that Mrs. Lomi had full power under the will of her brother (to which will I afterwards referred at Doctor's Commons) to dispose of her property absolutely as an unmarried woman. On my telling Dr. Ashwell that the residue was undisposed of, he said that Mrs. Lomi understood that he would take the residue as executor. I told him that was not the law. He said Mrs. Lomi's intention was decided to give him the residue, and, acting upon that understanding, we proceeded to confer as to the mode in which the omission should be supplied, so that her wishes in that respect should be carried out. After some discussion it was arranged—very likely on my suggestion—that I should prepare a fresh will for her to the same effect as the will in her own handwriting then under discussion, but providing for the omission in regard to the residue. I told Dr. Ashwell that, for that purpose, I ought to see Mrs. Lomi, and take her instructions from herself; intimating to him, that although I had confidence in him, the fact of my preparing the will without previously seeing the testatrix might occasion him trouble hereafter." I cannot but think that Mr. Matthews would have more properly discharged his duty if, not relying on the positive assurance of Dr. Ashwell, he had insisted upon seeing the testatrix, and obtaining instructions from her, and not from Dr. Ashwell. "In reply to this suggestion of mine, Dr. Ashwell said she was so ill that the introduction of a solicitor, a stranger, would be very painful to her; and besides, that she [484] was so watched by Dr. Lomi, her husband, that it would be attended with difficulty. He explained also that if any witnesses were necessary, it would be desirable they should be the same who had before witnessed the will, and who, he said, being resident in the neighborhood, could be more easily introduced to her as opportunity offered." Here, then, is a disclosure to Mr. Matthews, by Dr. Ashwell, that this is to be a secret and clandestine business, that the will is to be executed in the presence of certain persons, because being tradesmen in the neighborhood, it was more likely they could be introduced without observation. "I then told Dr. Ashwell that, under the circumstances, I would take Mrs. Lomi's will as instructions for preparing a new one, but that I must rely on his getting the words "residuary legatee" added to it in her handwriting to complete the instructions; and that so altered, it (the autograph will) should be lodged with me as my justification whenever I required it." Here, again, I must say that Mr. Matthews was thrown off his guard very much; he had merely the assurance of the person who was to take the residue; he acted without due caution; he suggested that the words should be added in her own handwriting. What influence Dr. Ashwell might have had over the deceased's mind at that time seems not to have impressed itself upon Mr. Matthews. "It was distinctly understood between Dr. Ashwell and myself that the will so to be prepared by me was not to be executed until Mrs. Lomi had, in her own handwriting, put in words constituting him her residuary legatee. Upon that understanding I then, in Dr. Ashwell's

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presence, prepared the new will. I made a draft first, and then copied it fair, and handed it to Dr. Ashwell, and he took it away with him, together with the original (the autograph) will. The new will so prepared by me was in substance the same, as to contents, as the autograph will, except in the addition of the residuary bequest. On reflecting " (it is a pity it did not occur to him earlier) " on the matter, after having given the will as just described to Dr. Ashwell, I felt so strongly the propriety of my seeing Mrs. Lomi in respect thereto, that I went late in the evening—I think about nine o'clock—of the same day, and called upon Dr. Ashwell to state my wish. He told me, however, that the will I had prepared was then with Mrs. Lomi, and that it was either executed, or would be that night; and he informed me that Mrs. Lomi had already inserted the words ' residuary legatee ' in the original will. I am not positive as to the fact, but my present impression is, that he had the autograph will in his possession, and that he then showed it to me with the words ' residuary legatee ' added to it, as I afterwards saw it, and as it now appears. I well recollect that I came away from Dr. Ashwell's on this occasion satisfied that the words had been added. I have a floating impression on my mind that at the time I prepared Mrs. Lomi's will I thought it likely that there might be some settlement under which, in addition to her brother's will, her power of appointment over her property was derived, and I think I must have spoken to Dr. Ashwell on the subject. I did not, however, know or ascertain the fact to be so, and the will, therefore, contained no reference to any settlement." This will was executed by the deceased on the 9th of October, in the presence of the same witnesses who had attended on the 7th of October, and at an hour appointed when Dr. Lomi was likely to be, and was, in fact, absent, and without his knowledge. Of these circumstances Dr. Ashwell was fully aware, because, when Mr. Matthews proposed to see the deceased, Dr. Ashwell answered, 485] *—" Not only that the presence of a solicitor would be painful to her, but that she was so watched by Dr. Lomi, that it would be attended with some difficulty." Tradesmen in the neighborhood, whose access to the house would be more easily accomplished than that of strangers, were selected as witnesses— Mr. Lane and Mr. Hough. They certainly do speak to the recovery of the deceased, at least in appearance, from the state they had seen her in on the 7th; she was more cheerful and entered more fully into conversation. Mr. Hough expressed a wish to know what instrument he was signing, because, he said, that on a former occasion he had got into difficulty from putting his name to a paper, the purport of which he did not understand. The deceased told him it was her will (she knew, therefore, that she was executing a will), and the witnesses accordingly attested the execution. They were, however, almost strangers, and even then did not know that such a person as Dr. Lomi existed. According to the evidence of the Blackwells, after the execution of the will Mrs. Lomi expressed her approbation of it, and said she felt happy that she had made such a disposition of her property, and hoped there would be something handsome for Dr. Ashwell in return for the trouble and attention he had bestowed on her. I conclude, therefore, that the will was executed by her with a knowledge of its contents, and of the disposition in favor of Dr. Ashwell. An accidental circumstance led to the alteration of this will by the execution of a codicil. A Mr. Savery, of Bristol, an attorney, employed by Mrs. Lomi in the year 1846 in reference to the settlement made in February of that year, in the month of October, 1847, sent in his bill of costs. " On the 30th of October," says Mr. Matthews, " Dr. Ashwell called on me and showed me a bill of costs from Messrs. Savery & Co., which had been sent in to Mrs. Lomi. There was a reference in the bill to a settlement or settlements prepared for Mrs. Lomi, and Dr. Ashwell was anxious to know how far such settlements would affect the disposition Mrs. Lomi had made of her property. I suggested it was desirable to see the settlements. He said he did not desire to trouble Mrs. Lomi to make search for the papers, as she was so ill; but if I thought it essential that I should see the settlements he would try and get them." Now, these papers were, it seems, deposited at that time in a box under Mrs. Lomi's bed, and they were delivered to Dr. Ashwell. Mr. Matthews continues: " On the 3d of November, Dr. Ashwell again called upon me; he brought with him attested copies of two deeds, to which Mrs. Lomi and her husband were parties, namely, a deed of settlement, and a deed of confirmation of the settlement. Dr. Ashwell told me

that he had Mrs. Lomi's instructions that if there was anything was to be done to her will in consequence of these settlements, I was to do it. Having glanced over the settlements very cursorily, I suggested to him that it would be better to reshape the will in reference to the powers in the settlement, and that it could be done by a codicil, and on Dr. Ashwell saying that Mrs. Lomi's state did not admit of delay, I arranged to call upon him that evening after I had prepared the proposed codicil. I did sketch out a codicil, and I called upon him as arranged. Whilst with him on this occasion I thought it better to read through the deeds carefully (I had only done it very cursorily before.) On doing so I discovered that Dr. Lomi would, under them, in consequence of there being no issue of the marriage, take 4000*l.* settled property, independently of any disposition she should make in his favor, and I told Dr. Ashwell so. He said he was quite sure Mrs. Lomi had no idea of that fact, but believed she had full power to dispose of the whole *fund; and he expressed an opinion that Mrs. Lomi intended [486 the English bank stock, which she had left by her will to Dr. Lomi, should be in lieu of the 4000*l.*; the value of the funds being about the same." I do not find that Mrs. Lomi had ever intimated such an intention, probably that was a conjecture of Dr. Ashwell. What the real value of the bank stock is I do not know, but it is somewhat strange that if such was the deceased's intention, she should not have communicated to Dr. Ashwell and Mr. Matthews the purport of the deeds, which had been so carefully explained to her by Mr. Savery before she left Bristol, and which were brought to her attention in May, 1847, when the will of that date was drawn up. "I told him that that being the case, the better plan would be to revoke the bequest to Dr. Lomi of the bank stock, but that for drawing a clause to that effect I must certainly have Mrs. Lomi's personal instructions. He represented the same difficulties as before in regard to my seeing her." It appears that from the time of deceased's removal to Carlton Villas no one had had an interview with her except the servants and nurses, and Dr. Lee, who was called in in consultation in November. "But he said that he thought he could get me one interview with her. I told him if her intentions were as he supposed, and he would explain the matter to her in the interval, I would prepare the codicil, and take it up to her on his informing me of her wish to that effect. He called upon me next morning, and told me that he had explained the matter to her, and that she was prepared to execute the codicil." So that the codicil was prepared on the assurance of Dr. Ashwell that he had explained the matter to the deceased, and she was prepared to execute it. "He informed me that he had made an appointment for that afternoon, because it was supposed that Dr. Lomi would then be away." Herein is the actual concurrence of Dr. Ashwell in a secret and clandestine execution of this instrument by a lady who at the time was in such a precarious state that the matter would admit of no delay. Mr. Matthews, at the time appointed, went to deceased's house, accompanied by his clerk Mr. Gee, "On arriving at the house we saw the servant Blackwell, who appeared to be aware of the object of our visit. Dr. Ashwell, I think, had said he would be so. (So here again Blackwell is made a party to the clandestine introduction of Mr. Matthews, for so I must call it.) He showed us up to Mrs. Lomi's bedroom. We found her sitting up in bed, and evidently prepared to receive us. She looked very ill in health. I introduced myself and the subject of my visit by mentioning my name to her, by saying that I believed Dr. Ashwell had named my coming, or in some such general way. Then I stopped. I hesitated to go on because the female servant was in the room. Mrs. Lomi understood apparently my motive, for she immediately made a sign to the servant to leave the room, which she did, and I and Mr. Gee were left alone with her. I then entered with her upon the subject of my visit. I told her of the discovery I had made, that by her settlement Dr. Lomi, her husband, took 4000*l.* independently of any disposition in his favor, and that I understood that it was not her intention that he should take that sum and the bank stock too, and that the codicil I had brought with me had been accordingly framed to meet that. By her request I read the codicil to her; I read it very carefully and slowly, and she paid particular attention to it as I read. She said she had intended to give her husband the bank stock, but not in addition to the 4000*l.* I suggested to her that perhaps she would like to alter the codicil, and that if so, I would do so in accordance with her wishes. In fact, I

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487] was *anxious that she should propose to have it altered, it would have been a satisfaction to me and I should have preferred it, as in that case the instructions would have emanated directly from herself."

Undoubtedly, and it would have been a satisfaction to the court if Mrs. Lomi had given her directions immediately to Mr. Matthews and not through Dr. Ashwell, who was to derive so much benefit from its execution. "She said, however, she did not wish the codicil altered at all. She expressed her entire satisfaction with it, and stated she would rather have it executed as it was. I entered fully into explanation of the general and particular effect of the codicil, and more especially in reference to the disposition of the residue to Dr. Ashwell. I asked her if she fully understood that Dr. Ashwell would take for his own benefit the whole residue of her property, and whether she desired it should be so, and she said it was her wish, and she did not know any person that she should be so pleased to give it to, or made use of words to that effect. In the course of our conversation much was said by her in reference to her husband and the settlement, and the property he had thereby professed to settle upon her. She said it was a deception on his part; that he had, in fact, made no settlement, and that she had never received to the value of a needle-full of thread from him—that was her expression. That he had deceived her throughout, and that she had no intention to aggrandize him." Mr. Matthews then deposes to the execution of the codicil, and that the testatrix was of perfectly sound mind, memory, and understanding at the time. Such then is the account given by Mr. Matthews of the preparation of the testamentary instruments on which he was consulted, not by the deceased, but by Dr. Ashwell. The account which Dr. Ashwell gave to Mr. Matthews is confirmed in most respects by the evidence of the Blackwells. The preparation and execution of the codicil and the reading over and explanation of it to the deceased by Mr. Matthews, are distinctly spoken to by him and by Mr. Gee, his clerk. The effect, then, of this account is now to be considered. The evidence is that the first of these papers, that of the 7th of October, is in the handwriting of the deceased; that by it she did not continue to bequeath the residue of her property to her husband; that she made no disposition of the residue. As that paper is in her own handwriting, so far as it goes it must be taken that she executed it with a full knowledge of its effect, except as regards the legal point, whether by the appointment of a nude executor he would be entitled to take the residue of the property without actual disposition. I cannot therefore doubt that if the deceased were of sound mind that instrument must be held to contain her intentions. There is, then, the will of the 9th of October, founded upon the previous will, to which had been added, on the suggestion of Mr. Matthews, the residuary clause in the handwriting of Mrs. Lomi. Unless the deceased were at the time in a state of incapacity, I must hold that in executing that instrument she knew and understood the contents, and that the residue passed under it. We now come to the discovery that Dr. Lomi took 4000*l.* under the settlement, which led to Mr. Matthews being introduced to the deceased. That was undoubtedly a very fortunate circumstance for Dr. Ashwell, for as regards the execution of the wills of the 7th and 9th of October, I should have had considerable difficulty in pronouncing for the latter upon the testimony of the two subscribing witnesses, who knew nothing whatever of the deceased, of the contents of the will, or of the existence of Dr. Lomi at the time. However off his guard 488] Mr. Matthews may have been, however incautious in the first instance *with respect to the preparation of the will, he was more on his guard, more cautious, with respect to the execution of the codicil. He had an interview with the deceased, and he gives in his evidence a full explanation of all the circumstances attending that interview, which the court must believe on his representation. He clearly states that the deceased was of full capacity to know and understand the contents of the instrument. It is true that as regards her bodily state she was in a very reduced state, but I do not find from the testimony of any of the witnesses that there was any appearance of imbecility of mind or incapacity. The argument of counsel on this head was principally founded on the nature and tendency of the disorder under which she suffered, and there was evidence to show that the disorder has in some cases the effect of impairing the mind. There was evidence, especially that of Dr. Locock, that stimulants at the time he visited her would have been improper. He saw her in April, 1847, or in the beginning of

the following month of May. Therefore, he could give an opinion only; nothing more than an opinion—as to what would be proper treatment in an after stage of the disorder; he could give no opinion as to her state of mind and faculties at the time the instruments were executed. No other medical man, except Sir Charles Scudamore and Dr. Lee, saw Mrs. Lomi after she left Bristol. Sir Charles saw her for the last time on the 4th of July. He considers the treatment followed by Dr. Ashwell was not proper. That is his notion; but even if that were so, and if the tendency of the disorder were to affect the mind, there must be proof not only of that tendency, but that the mind was in this particular case actually impaired before the court could pay any attention to that. No person is produced to say any such thing. Dr. Lee, who saw the deceased on several occasions between the 29th of November, 1847, and the date of her death, not only concurs in the statement of Dr. Ashwell as to the propriety of the treatment, but he also states that on the occasions of his visits there was not the least appearance that the mind of Mrs. Lomi was affected; her faculties were in as good a state of vigor as they could possibly be. I cannot but think, upon such evidence as this, it is too much to say that the deceased's faculties were so impaired as to render her liable to influence, or incapable of understanding the contents of the instruments in question, one of which was drawn up in her own handwriting and the other explained to her. The evidence is that her mind was unimpaired, therefore the instruments executed under the circumstances I have stated must be considered as the testamentary disposition of a capable testatrix. It is true this lady was in a position to be taken advantage of. No person was permitted to see her but those who lived in the house, except her husband, the medical attendant, and the parties who were necessarily called in to witness the execution of the paper. Such execution was a transaction of a clandestine and secret nature, although possibly at the desire of the deceased. However, as Mr. Matthews at last did what he ought to have done at an earlier stage—saw the deceased and explained the circumstances as to Dr. Lomi's position, and as she fully understood and adopted the codicil prepared by the instructions of Dr. Ashwell, I think there is sufficient evidence to call upon the court to pronounce for the validity of the will of the 9th of October and the codicil of the 4th of November. There remains the question of costs, and I was much pressed to condemn Dr. Lomi in them, in order to protect Dr. Ashwell from a prejudice which has been created against him, and the obloquy under which he has been laboring for some *time as to the part he [489 has taken in this transaction.

There seems to be no foundation for the charge that Dr. Ashwell pursued the treatment he did, even if were improper, with any view of reducing the deceased to such a state as to render it more easy to carry into effect the intention which it is suggested he entertained against the lady's property. Moreover, there is no foundation for a further charge of misappropriation of the deceased's property. Nevertheless, I must bear in mind the situation in which Dr. Lomi was placed. At the time of leaving Norland square he was on terms of affectionate intercourse with his wife; and notwithstanding the evidence of the Blackwells, there seems, after the removal to Carlton Villas, to have been no cause given by him for the alteration of his wife's conduct towards him until the 9th of November, after the execution of the codicil, when Dr. Lomi conducted himself in a very strange manner. How any alteration was produced in respect of Mrs. Lomi's feelings towards her husband, the court has no evidence whatever; but the fact is so. Dr. Lomi was excluded from access to his wife's room, except upon particular occasions, and he was kept in ignorance of everything going on as regards the transaction of the will, and the presents which were from time to time made to Dr. Ashwell. He was, therefore, placed under very peculiar disadvantages; he had no one (for no one was permitted to see the deceased except those I have mentioned) to supply him with information as to the real state and condition of the deceased. The principal persons who have been brought forward in this cause were acting in concert with Dr. Ashwell in concealing from Dr. Lomi the preparation of these testamentary papers. It is very true that communications were made by Dr. Lee and Dr. Ashwell to Dr. Lomi on the state of the deceased, and he knew that stimulants were administered to her; but whether he knew the full extent to which brandy was taken by her is not very clearly to be collected from the evi-

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dence. Be that as it may, Dr. Lomi was in an unfortunate position — not master in his own house. If he had attempted to eject either Charlotte Blackwell or her husband, he would in all probability have been ejected himself. Therefore I say that Dr. Lomi's situation must be taken into consideration. The court has not to determine upon delicacy of conduct, whether Dr. Ashwell's conduct in the responsible position he stood towards this lady was becoming. It has to determine a question of law, and that it has decided in favor of Dr. Ashwell. But I cannot think it is a case in which Dr. Lomi can be accused of having maliciously brought forward these accusations against Dr. Ashwell, although they have not been established by evidence. Explanations have now been given of certain circumstances, but how could Dr. Lomi foresee that? He was kept in entire ignorance of all that was going on in his own house; his egress and ingress were watched, to enable the parties to smuggle in the witnesses to attest the execution of the will, by which his interests were so materially affected. He knew nothing at all about the circumstance until the morning after the death of the deceased, when it was communicated to him by Dr. Ashwell that a will had been executed. Whether even then Dr. Ashwell informed him of the circumstances under which the will had been prepared; whether he communicated to him that witnesses had been introduced into the house, after it had been ascertained that he was not at home; whether he were informed that, in the first instance, the chemist had been proposed as a witness, but that he had been rejected because Dr. Lomi was in the habit of going to his shop, and might have gained an inkling of what was going on, does not appear from the evidence; but bearing those facts in mind, 490] and, *further, that Dr. Lomi was excluded from his wife's room, whether by her desire or not, with the active concurrence of the Blackwells, and, as it appears, with the full knowledge of Dr. Ashwell, I cannot say that imputations have been cast by Dr. Lomi, with the knowledge that they were false and malicious. It is not a case in which the court ought to condemn the defendant in costs. The will and codicil are made in favor of a person of whom the deceased knew nothing, perhaps not of his existence until he was called in to consult with Sir Charles Scudamore as to the condition of the deceased. There was, therefore, a period of five months which Dr. Ashwell had to make an intimacy with the deceased, and obtain a confidence which has resulted in a large bequest of at least 10,000*l*. I cannot but think that if Dr. Ashwell's character has in any degree suffered, he must be responsible for that himself. The court can never feel any approbation of clandestine proceedings so carried on, and terminating in a large bequest to a medical practitioner from a patient whilst in attendance upon him. I therefore content myself in pronouncing for the validity of the will and codicil, and decree probate to Dr. Ashwell, as the executor named therein.

Proctors for executor: *Jennings & Son*.

Proctors for defendant: *Shepherd, Bedford, & Middleton*.

Courts of Equity have jurisdiction to set aside wills obtained by fraud or undue influence and probate courts to refuse them probate. 1 Sto. Eq. Jur. § 184 and note. But see *Clarke v. Sawyer* 2 N.Y., 498.

That the draftsman of a will takes a legacy under it, is suspicious only in connection with other circumstances indicative of fraud or undue influence. *Coffin v. Coffin*, 23 N.Y., 9; *Crispell v. Dubois*, 4 Barb., 393; *Lansing v. Russell*, 13 Barb., 510; *Barry v. Butlin*, 2 Moore's Priv. Council, 480; *Mitchell v. Thomas*, 6 Id., 137; *Greenville v. Tyler*, 7 Id., 320; *Scouler v. Plowright*, 10 Id., 440; *Newhouse v. Goodwin*, 13 Barb., 236; *Leaycraft v. Simmons*, 8 Bradf., 85.

Some affirmative testimony must however be given tending to show that the will was the spontaneous intention of the testator. *Crispell v. Dubois*, 4 Barb., 393; *Tyler v. Gardner*, 85 N.Y., 539, 595; *Barry v. Butlin*, 2 Moore's Priv. Council, 480; *Mitchell v. Thomas* 6 Id., 137; *Greenville v. Tyler*, 7 Id., 320; *Scouler v. Plowright*, 10 Id., 440.

A legacy to the testator's physician is presumptively fraudulent, arising from the confidential relation between him and the testator. *Crispell v. Dubois*, 4 Barb., 393; *Lansing v. Russell*, 13 Barb., 510; *Greenville v. Tyler*, 7 Moore's Priv. Council, 320.

So to any person, as an agent, a counsellor, or a guardian, sustaining a re-

lation of peculiar-confidence with the testator and obtaining the execution of the will. *Vreeland v. McClelland*, 1 Bradf., 393; *Lemburger v. Rauch*, 2 Abb. N.S., 279; *Lee v. Dill*, 11 Abb. Prac., 214; *Saber v. Renney*, 33 Barb., 49. See Moak's note to Clarke's Chy., 96, new ed.

So in favor of one living in adultery with the testator. Will of McGuire 1 Tucker, 196; *Dean v. Negley*, 41 Penn., St. Rep., 812; 1 Am. Law Reg. N.S., 283; *Kessinger v. Kessinger*, 37 Indiana, 341.

Although in all such cases if shown to conform to the testators desires it is valid. *Crispell v. Dubois*, 4 Barb., 393; *Lemburger v. Rauch* 2 Abb., N.S., 279; *Wilson v. Moran*, 3 Bradf., 173; will of McGuire, 1 Tucker, 196.

Mere gratitude or importunity is not however sufficient evidence of undue influence. *Bleecker v. Lynch*, 1 Bradf., 458; *Gardner v. Gardner*, 34 N.Y., 162; *Vandusen v. Rowley*, 8 N.Y., 358. Moak's note to Clarke's Chy., 96 new ed.

CHANCERY APPEAL CASES

(Including Bankruptcy and Lunacy Cases)

REPORTS

THE LORD CHANCELOR

AND THE

COURT OF APPEAL IN CHANCERY.

(Law Reports, 8 Chancery Appeals, 1.)

L.C. Nov. 2, 4, 5, 1872.

1]

BARFIELD v. LOUGHBOROUGH.

[1865 B. 841.]

Partnership Accounts—Interest after Dissolution—Annual Rests—Money Received.

In taking the accounts of a partnership, interests after the dissolution will not in general be allowed to the partners on their respective capitals, though interest during the partnership with annual rests is allowed; but this rule may be varied by the terms of the articles, as, for example, by a provision treating the capital left in by a partner as an interest-bearing loan.

Any sums of money received after the dissolution and retained by either partner ought to be debited to him, and applied first in reduction of the interest due to him, and then in reduction of his capital.

Order of *Mulins*, V.C., varied.

Pilling v. Pilling (1) questioned.

THOMAS LOUGHBOROUGH and Samuel Barfield carried on business in partnership as attorneys and solicitors under the provisions of a deed bearing date the 23d of December, 1854, which provided that T. Loughborough should have two-thirds and S. Barfield one-third of the profits. The fourth clause of the deed was

“That the capital requisite for carrying on the said partnership *business shall be advanced and brought into the said business by the said partners in the following proportions: (that is to say) two-thirds by the said Thomas Loughborough, and the remaining one-third by the said Samuel Barfield. And that in case either of the said partners shall at any time or times, with the consent of the other of them, advance or lend to the

(1) 8 D. J. & S., 162.

*See *Vyse v. Foster*, post p. and note.

said co-partnership, or leave therein with such consent as aforesaid, at any settlement of accounts as hereinafter mentioned, any sum or sums of money, then and in every such case the said partners respectively shall be considered as creditors of the said partnership in respect of such capital and advances so respectively made by them or left as aforesaid, and shall be allowed interest for the same after the rate of five pounds per centum per annum." The 20th clause provided that the partners should during the co-partnership, in the month of December in each year, make up a general account in writing of all the business transactions and other matters and things relating to the partnership, and that upon the settling of every such account the clear gains and profits of the joint practice should be divided between the partners according to their respective shares.

The partnership was dissolved by a decree made in this suit on the 11th of December, 1867, and the accounts were directed to be taken. In taking the accounts the Vice-Chancellor Malins had decided (July 3, 1872) on summons, that up to the date of the chief clerk's certificate, interest must be allowed to each partner on his capital account, with annual rests, each partner being debited with interest upon his drawings from the date of such drawings respectively to the end of the year.

Mr. Loughborough appealed as to the allowance of interest, and also on other grounds, which do not call for a report.

Mr. *Hardy*, Q.C., and Mr. *Higgins*, Q.C., for the appellant :

It has long been decided that neither articles of partnership nor any usage between the partners will have any effect after a dissolution, and that the property will then be simply divided without any allowance of interest. This is clear upon the cases : *Watney v. Wells* ⁽¹⁾; *Dinham v. Bradford* ⁽²⁾; *Clark v. Leach* ⁽³⁾; *Cooke v. Benbow* ⁽⁴⁾; *Pilling v. Pilling* ⁽⁵⁾; *Parsons v. Hayward* ⁽⁶⁾; *Bonville v. Bonville* ⁽⁷⁾; *Wood v. Scoles* ⁽⁸⁾.

Mr. *Shapter*, Q.C., and Mr. *Stallard*, for Mr. Barfield :

Mr. Barfield left in large sums of money on the faith of being allowed interest, and he ought not to lose it: *Smith v. Donaldson* ⁽⁹⁾ and *Pilling v. Pilling* are clear authorities as to the rule. In *Watney v. Wells* ⁽¹⁾ the money was in court.

Mr. *Hardy*, in reply.

Nov. 5. LORD SELBORNE, L.C.: The questions on which I reserved my judgment are, whether the vice-chancellor was right, first, in directing interest to be charged and allowed after

⁽¹⁾ Law Rep., 2 Ch., 250.

⁽²⁾ Law Rep., 5 Ch., 519

⁽³⁾ 1 D. J. & S., 409.

⁽⁴⁾ 8 D. J. & S. 1.

⁽⁵⁾ Ibid., 162.

⁽⁶⁾ 4 D. F. & J., 474.

⁽⁷⁾ 85 Beav., 129.

⁽⁸⁾ Law Rep., 1 Ch., 369.

⁽⁹⁾ 2 Dec. in Court of Session, 8d Series, 86.

the dissolution of the partnership in this case; and, secondly, in directing this to be done with annual rests?

A claim to have partnership accounts, subsequent to the dissolution of a partnership, taken with interest as between the partners, must (in the absence of any facts raising particular equities) be maintained, if at all, upon the footing of an agreement to that effect. In such a case, interest is not due, either upon the footing of delay in the payment of a liquidated debt, payable at a time certain, or upon that of the use by one man for his own profit and advantage of the money belonging to another. Neither partner has a personal demand upon the other for the repayment of his share of the capital employed in the business. It is payable, not at any fixed time, but in a due course of liquidation, out of the assets when realized. These assets are not in the meantime (unless under exceptional circumstances) productive of benefit to one partner rather than to another; they have simply to be got in and realized, and then applied and distributed for the benefit of both partners, according to their respective interests.

4.] *In most of such cases there is either an express written agreement, or practice and usage equivalent thereto, that, during the continuance of the partnership, interest shall, before each division of profits, be credited to both parties on the amount of capital standing to the credit of their respective accounts. But it does not appear to me to be a legitimate inference from any such agreement or practice which is merely of this nature, that, after a dissolution, interest should continue to be allowed until the final adjustment and settlement of the partnership accounts.

There are frequently express provisions in partnership articles with respect to the payment of interest on the share of capital of one partner retained by another after dissolution. When no such provision is made, the principles of the settlement which ought to be made between the parties are applicable to a dissolved and not to a continuing partnership, and it would be an unwarrantable extension of the terms of an express agreement, limited to the period of the continuance of the dealings, to apply it to a period when the partnership and the partnership dealings no longer continue, except for the sole and special purpose of winding up the affairs. The foundation of the contract for the allowance of interest in such cases is the employment of the capital of the partnership in profitable business transactions, or in transactions from which profit is expected to accrue; but the contract for such employment of the capital terminates at the moment of dissolution, and no new transaction ought afterwards to be undertaken. If the affairs could be then immedi-

ately wound up, the whole assets would be immediately applicable in payment, first, of the debts of the concern, next of the sums due at that moment to the partners respectively; and if there were any ultimate surplus, such surplus would be distributable between the partners as profit on the previous transactions.

If (as generally happens) there are impediments to the immediate realization of the assets and settlement of the accounts, this state of things does not alter the nature of the rights and interests of the partners in the assets then existing, though to be afterwards realized. Nor does it seem to make any difference in principle if one of the consequences of the delay should be to increase or diminish by subsequent accretions or losses the amount of the *surplus distributable as the ultimate profit of [5 the business carried on before the time of dissolution.

I should hold, therefore, on principle, that no interest is, after dissolution, payable between partners merely on the ground that they have still remaining in the concern unequal shares of capital, on which, during the continuance of the partnership, they were entitled, either by express agreement or by their course of dealing, to have interest credited with or without rests.

The authorities, with the one exception, *Pilling v. Pilling* (1), seem to me to be in accordance with this view. *Boddam v. Riley* (2), before Lord Thurlow, which was affirmed in the house of lords; *Parsons v. Hayward* (3), in 1862, particularly the *dicta* of Lord Westbury (4); *Wood v. Scoles* (5), before the lords justices, in 1866, in which case their lordships declined to treat sums described in the articles as "capital" and "additional capital" on the footing of debts of the partnership, so as to allow interest upon these sums after the dissolution; while they did treat as debts payable with interest after the dissolution, advances, *ultra* the stipulated amount of "capital" and "additional capital" which has been made by a partner by way of loan to the partnership; and, lastly, *Watney v. Wells* (6), decided first by the master of the rolls, and afterwards, in 1867, by Lord Chancellor Chelmsford.

If *Pilling v. Pilling*, decided in 1865, is not to be explained by any special circumstances, it seems right to observe that it was decided, in the first instance, by the judge whose later decision in *Watney v. Wells* was affirmed by Lord Chelmsford; and by the same lords justices who afterwards, in 1866, decided *Wood v. Scoles*. In *Smith v. Donaldson* (7) the advances on which in-

(1) 8 D. J. & S., 163.

(2) 2 Bro. C. C., 2.

(3) 4 D. F. & J., 474.

(4) *Ibid.*, 485.

(5) Law Rep., 1 Ch., 369, 378.

(6) *Ibid.* 2 Ch., 250.

(7) 2 Dec., in Court of Session, 8d series, 86.

terest (with rests) was allowed were made to a dissolved partnership for the purpose of its liquidation; and a binding agreement for the allowance of such interest was held to be established.

I have entered so far into the abstract question, because I wish it to be understood that while I agree with the vice-chancellor in allowing interest after the dissolution (though without 6] rests) in this *particular case, I do so not upon general principles, but upon the special terms of this particular contract.

The fourth article of the contract of partnership in this case appears to me to place upon one and the same footing all such sums as the partners might "advance and bring into the business" as their respective proportions of "the capital required for carrying on the partnership business," and such money as either partner might at any time, "with the consent of the other of them, advance or lend to the said co-partnership, or leave therein, with such consent, at any settlement of accounts" as after mentioned. And it was expressly agreed that, "in respect of all such capital and advances so respectively made by them, or left as aforesaid, the partners respectively shall be considered as creditors of the partnership," and "shall be allowed interest for the same after the rate of £5 per cent. per annum." The advances for the necessary capital, and any further advances by way of loan, are both here treated as equally constituting the relation of debtor and creditor between the partnership and the partner making such advances, and as creating a debt payable by the partnership with interest.

This brings the case exactly within the decision in *Wood v. Scoles* ⁽¹⁾, as to the advances which, in that case, were made by way of loan, *ultra* the stipulated capital and additional capital. Whatever may have been the reasons for this agreement (and perhaps they may be found in the particular course and nature of the business of attorneys and solicitors) its intention certainly appears to have been, to give the partners a right to interest on the footing (*inter se*) of debtor and creditor, and not merely on that of partner and partner. A creditor must always remain a creditor till the debt is paid.

For the allowance, however, of annual rests after the dissolution of the partnership, I can find no ground in the terms of this contract. Nothing is said expressly about rests, nor about compound interest. The right to compound interest during the continuance of the partnership was derived only from the combined operation of the right to simple interest under clause 4, and the provision for the annual balancing of accounts yearly

(1) Law Rep., 1 Ch., 369, 378.

during the said co-partnership, contained in clause 20; and from the practice *which, in accordance with those provisions, [7 and with the usual course of similar partnership accounts, was actually followed till the dissolution. But it is clear that the provision for yearly accounts is inapplicable to the period after dissolution. Where the relation of partners in a going concern, in which accounts are annually to be made up, has come to an end, the usage of yearly rests, which is a mere consequence of that relation and of these accounts, comes also to its natural end.

The authorities which decide that balances due upon an account between banker and customer, kept during the continuance of that relation according to the usage of bankers, with yearly or half-yearly rests, carry simple interest only from the time when the relation of banker and customer has terminated by death or otherwise, proceed upon a principle which seems to be not less applicable to a case like the present of rests in partnership accounts: *Fergusson v. Fyffe* (1); *Crosskill v. Bower* (2); *Williamson v. Williamson* (3).

I was at one time during the argument under the impression that the parties in the present case had not substantially acted upon the 4th clause of the articles of partnership, but an examination of the accounts produced in evidence has satisfied me that this impression was erroneous.

With respect to the drawings of each partner out of the partnership, I do not find in the partnership articles any provision for charging interest. Down to the date of the dissolution, the accounts ought in this respect to be taken upon the footing established by the usage of the partnership. After that date any sums received and retained to his own use by any partner out of the partnership assets ought to be debited to such partner, as at the dates when they were received, in reduction, first, of the interest accrued after the dissolution on the principal sum (if any) due to such partner at the date of the dissolution, and, secondly, of the interest bearing debt itself. For charging interest against either partner after the dissolution on sums not retained to his own use, and not shown to have been received or employed otherwise than in the proper course of the realization of the assets and liquidation of the concern, I see no ground.

*I propose, therefore, to make the following order: [8

Discharge the order of the 2d of July, 1872, and, instead thereof, direct that in taking the accounts under the decree, the plaintiff and the defendant respectively are, in respect of the period antecedent to the dissolution of partnership, to be credited with interest at the rate of £5 per cent. per annum on all sums from time to time, during that period, advanced by them respectively on account of their respective shares of the capital required for carrying on the partnership business, or advanced, or lent to, or left in the co-partnership, by either of them with the

(1) 8 Cl. & F., 121.

(2) 32 Beav., 86.

(3) Law Rep. 7 Eq., 542.

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consent of the other of them ; and that they are in like manner to be debited with interest at the same rate on all sums from time to time, during the same period, drawn by them respectively out of the said partnership for their own respective use ; such accounts in respect of the period aforesaid being taken with annual rests, according to the course and usage of the co-partnership, on the 26th day of December in every year subsequent to the date of the last settled account, and a final rest being made on the 11th day of December, 1867, the day of the dissolution of the partnership : And direct, that from and after the said 11th day of December, 1867, the plaintiff and defendant respectively are to be credited with simple interest on the balances due to them respectively from the partnership, on the day of the dissolution (or on so much of such balances as may not from time to time have been afterwards satisfied by moneys received and retained by them, or either of them, to their own respective use out of the partnership assets), at the rate of £5 per cent. per annum without rests.

No costs of the summons on which the order of the 8d of July, 1872, was made, or of the appeal motion. Deposit to be returned.

Solicitors : Messrs. *Hill & Son* ; Mr. *Loughborough*.

In the absence of an agreement that partners shall be allowed interest upon their capital none can be collected until settlement and a balance struck although one furnish more than his just proportion. *Dexter v. Arnold*, 3 Mason, 284 ; *Honore v. Colmesnil*, 7 Dana, 194 ; *Beacham v. Eckfords Exrs*, 2 Sandf., Chy., 116 ; *Lee v. Lashbrooks*, 8 Dana, 214 ; *Jones v. Jones*, 1 Iredell, Eq., 332 ; Parsons on Part, 229, note y ; Story on Part, § 182a ; but see *Lloyd v. Carrier*, 2 Lansing, 364.

Although general usage or general course of trade, that interest shall be paid a partner upon surplus capital, may be shown and entitle him to interest.

In re German Mining Co., 4 DeGex, MacNagten and Gordon, 19, and note to Little, Brown & Co's Ed., SC., 19, Eng. L. and Eq., 591, Parsons on Part., 229, note y.

And the partners may agree that interest thereon shall be paid, when the surplus capital and interest must be paid before any division of capital or profits. *Wood v. Scoles*, L. R., 1 Chy. App., 369.

But if interest be charged upon the firm books to the knowledge, actual or presumed, of the partners, or a balance including interest be struck it may be recovered. *Lloyd v. Carrier*, 2 Lansing, 364.

[Law Reports, 8 Chancery Appeals, 8.]

L.C., Nov. 5, 6, 7, 8, 11, 14, 1872.

GAUNT V. FYNNEY.

[1870 G. 118.]

Nuisance — Evidence — Trespass — Injunction — Jurisdiction — Delay

The amount of annoyance which will induce the court to interfere between the owners of adjoining buildings discussed and defined, and the nature and value of evidence in such cases considered.

Where a trifling trespass or an interference with an ancient right has been submitted to for six years, the court will not exercise its jurisdiction, but will leave the plaintiffs to their rights at law.

Decree of the master of the rolls reversed.

THIS was a suit instituted by the owners of a house for the purpose of obtaining an injunction to restrain the owners of adjoining buildings from causing nuisance by noise, and from trespass-

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ing by *encroachment, and from interfering with an ancient [9 light, and for the purpose of obtaining damages. The master of the rolls refused to grant an injunction, but made a decree for an inquiry as to damages, and for payment by the defendant of the costs of the suit.

The plaintiffs and the defendant both appeared.

The facts of the case appear in the judgment of the lord chancellor sufficiently for the purpose of this report.

Mr. *Anderson*, Q.C., Sir *R. Baggallay* Q.C., and Mr. *Rowcliffe*, for the plaintiffs, contended that the defendant could, at a very small expense, put an end to the nuisance: *Attorney General v. Colney Hatch Lunatic Asylum* (¹); *Yates v. Jack* (²). As to the question of damages or injunction, they cited *Hindley v. Emery* (³); *Senior v. Pauson* (⁴).

The *Solicitor General* (Sir *G. Jessel*), and Mr. *Fry*, Q.C., (Mr. *Marten* with them), for the defendant, as to delay, cited *Swaine v. Great Northern Railway Company* (⁵); *Crump v. Lambert* (⁶).

Mr. *Anderson*, in reply.

Nov. 14. LORD SELBORNE, L.C.: The plaintiffs, who are unmarried ladies, living at Leek, in Staffordshire, ask for an injunction (with damages) to restrain an alleged nuisance by noise and vibration, and to restrain alleged trespasses by encroachment on land and obstruction of light. The master of the rolls has made a decree, refusing an injunction, but granting an inquiry as to damages, from which decree both parties appeal.

Leek is a town in which the manufacture of silk is carried on. The plaintiffs' house faces a street called Derby street, to the south, and has a garden of some size to the north, with two stables to the east, separate from the house and from each other. *Eastward and southward of the nearer of these stables [10 (called the old stable), which is about nineteen yards from the house and garden, is a silk mill belonging to and worked by the defendant. The plaintiffs state that the defendant was formerly in the employment of the plaintiffs' father, who was a mill owner, carrying on the manufacture of silk in part of the buildings now occupied by the defendant. The defendant states that the plaintiffs' father (from whom they derive their title) deliberately placed his house (the same house in which the plaintiffs now live) close to the mill.

The mill has, however, been much enlarged by the addition of new buildings since that time. Down to the winter of 1864-5, it was worked by hand-power and a narrow strip of

(¹) Law Rep., 4 Ch., 146.

(²) Ibid., 1 Ch., 295.

(³) Ibid., 1 Eq., 52.

(⁴) Law Rep., 8 Eq., 380.

(⁵) 4 D. J. & S., 211.

(⁶) Law Rep., 8 Eq., 409.

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land between the northern part of it and the eastern wall of the plaintiffs' old stable remained unbuilt upon. In that winter the defendant caused this intervening space to be covered over, and erected a small steam engine, of about four-horse power, in the chamber so formed, connecting this engine by proper gearing with the machinery in the mill, which from that time forward was worked by steam. The plaintiffs made no complaint of any annoyance till the summer of 1870; and they were in the habit of keeping three or more horses or ponies in the old stable, till the end of October, in that year.

I consider it to be admitted upon the plaintiffs' pleadings, and established by their evidence, that there was no nuisance from noise or vibration, either to the house, or to the garden, or to the stables, prior to the end of May, or the beginning of June, 1870. But the plaintiffs allege that the defendant's mill then began to be worked with such a degree of noise as to become, after that time, a serious nuisance, that they remonstrated, and received promises of redress, but that nothing was effectually done to remedy the evil, and that in and after October, 1870, the noise and vibration increased daily, destroying or materially diminishing the comfort, salubrity, and value of their house and garden, and rendering the old stable unsafe and unfit for horses, in consequence of which their horses were removed from it at the end of October, or at the beginning of November, 1870.

The bill was filed on the 28th of November, 1870. The question *of trespass has emerged during the progress of the controversy; but this rests on distinct grounds, and must be separately considered.

The case thus made is met by the defendant with a general denial of the material facts alleged. He says that no changes have been made in his engine or machinery since January, 1865, except some which were made in 1870, to meet (as far as possible) the plaintiffs' objections; that the manner of working them has been throughout both in kind and in degree the same; that there has been no increase either of noise or vibration; that the state of things of which the plaintiffs now complain is a mere continuation of that which existed without complaint during the five preceding years, and which is admitted not to have then constituted a nuisance. In these statements he is supported by the evidence of every witness in the cause who has any knowledge of the interior working of the mill. [His lordship then referred to the evidence.]

. If the defendant's evidence is believed, the plaintiff's case fails. The burden of proof, as to this part of the case, rests wholly on the plaintiffs. The Scotch law has a phrase which,

in cases of this nature, may well admit of a negative, as well as of a positive application. It forbids a man to use his own rights "*in emulationem vicini*." Neighbors everywhere (and certainly in a manufacturing town) ought not to be extreme or unreasonable either in the exercise of their own rights or in the restriction of the rights of each other. The ruling, approved by the house of lords, in *St. Helen's Smelting Co. v. Tipping* ⁽¹⁾, that "the law does not regard trifling inconveniences," and that "everything is to be looked at from a reasonable point of view," and the observations of Lord Cranworth, seem to be particularly applicable to such a case as the present. [His lordship then read passages from the report ⁽²⁾.]

There may, of course, be such a thing as a legal nuisance from noise in a manufacturing or other populous town, of which the case of *Soltau v. DeHeld* ⁽³⁾ is an example. But a nuisance of this kind is much more difficult to prove than when the injury *complained of is the demonstrable effect of a visible [12 or tangible cause, as when waters are fouled by sewage, or when the fumes of mineral acids pass from the chimneys of factories or other works over land or houses, producing deleterious physical changes which science can trace and explain. A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbor builds a house against a party wall, next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable.

I am far from saying that there may not be a case in which the owner of a house very near a mill in a manufacturing town may be entitled to protection against noises resulting from the introduction into the mill of new machinery, or of new modes and processes of working. But in every case of this kind it ought to be clearly made out that the mill owner has exceeded his rights. When there has been no introduction of new machinery, and nothing new in the manner of working — when everything within the mill has gone on without change in the usual and accustomed course of the manufacturer's business — a plaintiff undertaking to prove that at and after a definite time the noise from the mill, admitted to have been previously lawful and harmless, became excessive and noxious imposes upon himself (to say the least) an arduous task.

And how have the plaintiffs acquitted themselves of this

(1) 11 H. L. C., 642.

(2) 11 H. L. C., 650, 651.

(3) 2 Sim. (N.S.), 133.

burden? I see no reason to doubt that they, and their servants and friends, who are witnesses in this case (several of whom have not been cross-examined), do themselves believe that the considerable increase of noise of which they speak has really taken place, and are persuaded that this noise is a serious nuisance. But it is not impossible that this should be the case, and yet that the witnesses for the defendant (none of whom have been cross-examined) should be believed. Those who compare the noise which they hear to-day with the noise which they heard months or years ago, are witnesses (within certain limits) to impressions [3] *upon the mind rather than to facts. Those who speak of the manner in which the engine and machinery have been worked, and the business of the mill carried on, speak of facts, and not of impressions on the mind. Mr. Fry made, in a part of his argument, a happy use of a passage in a recent work upon mental science ⁽¹⁾, which (treating of the influence of the mind upon the sense of hearing) says "that the thought uppermost in the mind, the predominant idea or expectation makes a real sensation from without assume a different character." Every one must have had some experience of the truth of this statement; a nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, originating within himself, sounds which at other times would have been passively heard and not regarded. In the present case, I have no doubt that a real "whirring sound," such as the plaintiffs' witnesses describe, did proceed from the machinery in the mill when at work, at all times, before as well as after the erection of the steam-engine in 1864-5. I have no doubt that this sound (and also the sound of the steam-engine), after its erection, was often, if not always, perceptible in the plaintiff's garden, and in some of the rooms of their house, especially when the windows were open; I have no doubt that it was louder and more audible at some times and when the wind was in particular quarters, than at other times and other states of the wind. I have no doubt that it must always have been more or less heard in the old stable, where the heads of the horses, as they stood in their stables, were turned towards the wall (described as a thin wall) on the other side of which the engine was fixed, and where there was a small window, which, but for its being closed by certain boards, would have opened directly into the engine room itself. But all this is admitted to have gone on from January, 1865, to June, 1870, without amounting to a nuisance.

[His lordship then stated that in June, 1870, a sudden noise had alarmed the servants of the plaintiffs, and that since that

(1) Tuke. *Influence of the Mind on the Body*, p. 47.

time the plaintiffs had entertained the idea of some danger from the *boiler used by the defendant. That from this time [14] forth the engine and its noises were to the plaintiffs a permanent source of irritation and uneasiness. His lordship then examined the evidence on both sides as to the house, and then the evidence as to the effect of the noise and vibration on the horses in the stable. Witnesses for the plaintiffs had stated that on one occasion the horses of a visitor when put in the stable suffered tremors, as to which his lordship said that this evidence did not make a powerful impression on his mind. The case of *Cooke v. Forbes* ⁽¹⁾ showed that it was not every occasional and accidental noise which might frighten a horse in a stable on a particular day that would entitle a plaintiff to an injunction, if the general case or habitual nuisance alleged in the bill was not satisfactorily proved. His lordship came to the conclusion that no sufficient case was made out, and that the bill, so far as it sought relief on the ground of nuisance, must be dismissed. As to the trespass, it appeared that part of the defendant's engine-house overhung the plinth of one of the plaintiffs' walls. The defendant, however, disputed the right of the plaintiffs to the plinth, and his lordship would not decide this question.]

His lordship then proceeded to say: It is enough, in my opinion, to dispose of this part of the bill, that the defendant had been, for nearly six years before the filing of the bill, in undisputed possession in a manner patent to the plaintiffs, though they may have not known the particular arrangement or position of his engine or machinery; and that the title to this small piece of land is in controversy between the parties. A bill for ejectment, by way of mandatory injunction, cannot, in my opinion, be supported under such circumstances. This part, therefore, of the bill must also be dismissed.

There is left only one more question, that of the obstruction of the window in the plaintiffs' old stable by the boards placed against it, and also by the roof of the defendant's engine-room. As to this I have felt some embarrassment. On the one hand, it seems to me that an unlawful obstruction by the defendant of an ancient, though not very valuable light has been established. On the other hand, this obstruction took place nearly six years *before the bill was filed, under the very eyes of the plaintiff- [15] iffs or their servants, who can never have gone into the stable without perceiving it; and the light does not appear to have been, for any practical purpose, missed or wanted since its obstruction. A bill for an injunction in such a case would, I think, before the passing of Lord Cairns' Act, have been dismissed, and the plaintiffs would have been left to their remedy at law.

(1) Law Rep. 5 Eq., 166.

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Since that act, if the bill were not dismissed, I should certainly agree with the master of the rolls in thinking the case one for an inquiry as to damages, and not for an injunction. But, finding myself obliged to leave the plaintiffs to their legal remedy (if any) as to the other matters complained of, and being of opinion that the obstruction of light is so connected with the other alleged trespass as to make it possible that some injustice might be done if damages as to the light were given here, and the plaintiffs at the same time left in possession of all their legal remedies as to the plinth of their wall and the disputed slip of land, I have come to the conclusion that the bill ought to be altogether dismissed, without prejudice to any action which the plaintiffs may be advised to bring.

The costs of the suit will follow the event; the plaintiffs appeal will be dismissed with costs. There will be no costs of the defendant's appeal; but the deposit will be returned.

Solicitors for the plaintiffs: Messrs. *Gregory, Rowcliffes, & Rawle*.

Solicitors for the defendant: Messrs. *Milne, Riddle, & Mellor*.

An injunction will not ordinarily lie to restrain a mere trespass although the exceptions to the rule are numerous. *Murray v. Knapp*, 42. How. Prac., 462; *Kerr on Injunctions*, 287-300, 818, 829-2

331; High on Injunction, §§ 420, 458-485; *Waterman's Eden on Injunctions*, 233-7; 2 Sto. Eq. Jur., §§ 928-9; 2 *Daniell's Chy. Prac.* (4th Am. Ed.), 1631-2

[Law Reports, 8 Chancery Appeals, 16.]

L.C. Nov. 11, 12, 14, 15, 1372.

16]

*GILBERT V. GUIGNON.

[1869 G. 7.]

Bills of Lading — Transfer — Priority — Acceptance — Inadvertence.

Corn merchants in California agreed to send cargoes of wheat to a miller in England, the reimbursement to be by his acceptance against bill of lading. The corn merchants shipped a cargo, and made out the bill of lading in six parts. Three parts, with corresponding bills of exchange drawn on the miller for the price of the cargo, were indorsed by the corn merchants, and transferred to a Californian bank for valuable consideration. These bills of exchange were, with the bills of lading annexed, accepted by the miller. One indorsed part of the bill of lading was inadvertently sent by the corn dealers to the miller, and by him transferred to an English bank for valuable consideration. The bills of exchange were not met by the miller:

Held, that the corn merchants were entitled to deal as they did with the cargo by transferring the bills of lading; that the English bank could not, under the circumstances, claim as holders of the bill of lading without notice; and that the English bank had no priority.

Quære, whether the miller might not have refused to accept the bills of exchange unless the bills of lading were delivered to him.

Decree of the master of the rolls affirmed.

MESSRS. Forbes & Co., who were corn merchants in California and at Glasgow, proposed to ship wheat from California to James Kemp, a miller in Devonshire, on the following terms, as contained in a letter written by their agent to Kemp, and dated the 21st of May, 1868: — "With reference to my letter of the 7th inst. respecting California wheat, I observed that I omitted the matter of reimbursement, which would be your acceptance at ninety days' sight against bill of lading."

The ninety days' sight was afterwards altered to sixty days' sight, and it appeared to be understood that Kemp intended to "finance the cargoes," or, in other words, deal with them before they arrived. On these terms Kemp ordered about twenty cargoes of wheat. The first cargo, at the price of £5625, was shipped by Forbes & Co. in the ship Theodore Ducos, and six bills of lading were made out by Forbes & Co., and signed by the master of the ship, all dated the 11th of September, 1868. Six corresponding bills of exchange for £5625 each were also drawn by Forbes & Co. *on Kemp; three of these bills were an- [17 nexed to as many indorsed bills of lading, and were, on the 12th of September, 1868, delivered by Forbes & Co. to the Bank of British Columbia, by way of security for a sum of money then advanced.

Forbes & Co., on the 12th of September, 1868, sent a letter to Kemp, inclosing therein an invoice of the cargo of the Theodore Ducos, and by a mistake of their clerk, or by inadvertence, inclosing also one of the bills of lading indorsed in blank. This bill of lading was, on the 11th of October, 1868, delivered by Kemp to the West of England Banking Company by way of security either for an advance then made or for money due by Kemp to the banking company. The circumstances under which this bill of lading was deposited, and how far the banking company were aware of the agreement between Forbes & Co. and Kemp, were much disputed. The conclusion to which the lord chancellor arrived is stated in his judgment.

The three bills of exchange were presented by the agents of Forbes & Co., or of the Bank of British Columbia, to Kemp, and were by him accepted with the bills of lading attached thereto. This latter fact was disputed by the banking company, but in the opinion of the lord chancellor was established. Similar proceedings took place as to other cargoes. With respect to one of these, it appeared that Kemp objected to accept the bills of exchange unless the bills of lading were left with him. Forbes & Co. thereupon, on the 26th of October, wrote to Kemp, saying that the holders of the bills of exchange must hold the bills of lading, otherwise their lien was illusory. On the 14th of December, 1868, the bills of exchange for £5625

were protested for non-payment by Kemp, up to which time Forbes & Co. had not, as they alleged, any suspicion that the bill of lading sent to Kemp had been used by him. On learning that the bills of exchange were dishonored, Forbes & Co. deposited the sum of £5625 as security to the Bank of British Columbia; that bank agreeing to take the necessary proceedings in respect of the cargo on being indemnified by Forbes & Co. The Bank of British Columbia, by arrangement with Forbes & Co., obtained possession of the cargo of the Theodore Ducos on its arrival in England.

The West of England Banking Company then filed the bill 18] in *this suit against the Bank of British Columbia, and Forbes & Co., and others, alleging that the sale of the bills of exchange to the Bank of British Columbia was subsequent to the time when the bill of lading was deposited with the banking company; that the Bank of British Columbia had notice that Forbes & Co. had parted with the control of the cargo; and that the plaintiffs were not, until the arrival of the ship, aware that the Bank of British Columbia had possession of any bill of lading. And the bill prayed a declaration that the plaintiffs were entitled to a charge on the cargo of wheat, in respect of the said sum of £5625, in priority to the charge of the Bank of British Columbia, with consequent relief.

The master of the rolls dismissed the bill with costs. The plaintiffs appealed.

Mr. Fry, Q.C., and Mr. Ince (Mr. Murch, of the common law bar, with them), for the plaintiffs:

Kemp had clearly a right to deal with the cargoes, and the documents must be such as would enable him to do so: *Dracachi v. Anglo Egyptian Navigation Company* (1). Even if the words of the contract might be construed differently, they are controlled by the custom of merchants, as shown in *Berndtson v. Strang* (2); *Shepherd v. Harrison* (3). Kemp had a right to consider the bill of lading as given in exchange for his acceptance. It is clear that Forbes & Co. have enabled Kemp to pledge this bill of lading, and the West of England Bank, if not prior in time, have at all events a good charge, without notice of any other.

Sir R. Baggallay, Q.C., and Mr. Kekewich, for the Bank of British Columbia.

Mr. Benjamin, Q.C., and Mr. Bradford, for Forbes & Co.: The bill of lading sent to Kemp could have no value after the first bills had been parted with: *Gurney v. Behrend* (4). At all events,

(1) Law Rep., 3 C. P., 190.

(2) Law Rep., 5 H. L., 116.

(3) Ibid., 4 Eq., 481, 483; Ibid., 3 Ch.,

(4) 3 E. & B., 622.

Kemp had no right to use it. If a man holding a bill of lading under a promise not to use it, does part with it, can his assignee thereby acquire any rights against the person who *entrusted [19 him with the bill? If Kemp has any claim against us, it is on tort for our wrongful conduct in not allowing him to deal with the cargoes. Neither he nor those who claim under him have any rights against us *ex contractu*. But we say that Kemp understood that we were to raise money on the cargoes. The cargoes to be sent were to the amount of nearly 120,000*l.*, and he knew that we must raise money on the first cargoes. As to the case set up of a purchase by the West of England Bank without notice, we contend on the evidence that the bank must have known on what terms the cargoes were sent.

Mr. Fry, in reply: Forbes & Co., have not given a satisfactory explanation of how they came to send Kemp the indorsed bill of lading, if they did not intend him to use it. They say that, at all events, it was not to be used; but when it was used, the transferee acquired a title: *Briggs v. Jones* (1). The defendants, in fact, suggest that this was a scheme between the plaintiffs and Kemp to defraud Forbes & Co.; but it is more like a scheme to entrap the plaintiffs.

LORD SELBORNE, L.C.: In this case I only called upon counsel for the defendants, Messrs. Forbes & Co., to address the court upon one branch of it; and after hearing the very able argument of Mr. Benjamin, and the light thrown upon the facts and the evidence in the course of that argument, I have come to a clear conclusion that the decision of the master of the rolls was right.

The case made by the bill really and truly is, that the plaintiffs have a legal priority by the first indorsement of one of a set of bills of lading, and that their right to that was in accordance with the contract between the vendor and purchaser of the cargo to which the bills of lading related. Now in the view I take of the case it is not necessary to dwell much, if at all, upon the question of mercantile understanding in contracts of this kind, which occupied a considerable part of the argument; but I think it well to say a few words upon the subject, by way of introduction to what *I regard as the only question in the cause re- [20 quiring serious consideration.

This contract for the purchase of wheat at San Francisco on the order of the miller in Devonshire was, according to the original letter of the 21st of May, 1868, upon the terms that reimbursement was to be made by the purchaser's acceptance, originally at ninety days' sight, afterwards altered to sixty,

(1) Law Rep., 10 Eq., 92.

against the bill of lading. The plaintiffs have argued that it was wrong for the unpaid vendors before acceptance of the bills of exchange, by means of which their reimbursement was to be made, to negotiate those bills of exchange, and to document them in the usual manner by annexing the bills of lading, and so sending them forward in the hands of the person discounting the bills of exchange. I apprehend, on the contrary, that the course is perfectly regular, and perfectly right and proper, unless, indeed, in a particular case, where there is an express contract that the bills of exchange are not to be negotiated. In no other way can the vendor protect himself, under these circumstances, against the contingency of the acceptance even of the bills of exchange being refused. The contract that he is to be reimbursed by acceptance against bills of lading cannot possibly disable him from dealing in the ordinary course of mercantile business with the bills of lading for his own protection so as to secure himself against liabilities upon the bills that he draws, at all events before they are accepted. Therefore, in negotiating these bills of exchange with the Bank of British Columbia, or those from whom the bank took them, in annexing to them the bills of lading, and so sending them forward to this country, Forbes & Co., as it appears to me, merely followed the proper and ordinary course of mercantile usage.

It might be quite consistent with these dealings that Kemp, the purchaser, should have a right, when the bills of exchange were presented to him for acceptance, to say he would not accept the bills under this contract, unless the bills of lading were at the same time delivered up to him. And if they had refused to deliver up the bills of lading, and he had offered acceptances on those terms as according to his contract, it may be that he would have had a right to bring an action for breach of contract as against Forbes & Co. That may be the case, and 21] as to that much *would depend upon the particular course of dealing between the parties, which might vary the mode in which the contract ought to be performed.

But the real substance of the contract in such a case is, that the purchaser is to be under the obligation to accept only when the bills of lading come forward to and are seen by him in the proper course of the transaction; and if he, having the bills of exchange presented to him for acceptance, with the bills of lading annexed to them, does not think fit to claim the delivery of the bills of lading to him (supposing him to have the right to do so), if he is content that they should remain in the hands of the holder, it is exactly the same thing as if he had previously and originally authorized the course of proceeding, and had himself adopted that mode, as it is expressed, of "financing the

cargoes;" and that, according to my view of the evidence, is what actually happened in the present case. There can be no doubt whatever that the bank of British Columbia sent forward these three bills of exchange with the bills of lading annexed to the three parts of the bills of exchange, and that these documents came in the ordinary course of business into the hands of their agents in London.

[The lord chancellor then referred to the evidence, upon which he came to the conclusion that the bills of lading must have been annexed to the bills of exchange when the bills of exchange were accepted by Kemp; and that the sending of the bill of lading to Kemp must have been done by inadvertence. Still, however, if this had enabled Kemp to deceive a third party, Forbes & Co., would, according to the principles of the court, be bound by what they had done. The bill, however, did not directly set up the case of the plaintiffs being holders for valuable consideration without notice of the transaction, and there seemed to be good reason why such a case should not be distinctly set up. His lordship then referred to the evidence as to the dealings between Kemp and the plaintiffs, and came to the conclusion that the plaintiffs must have known that there were six parts of the bills of lading, and that each would be documented with a corresponding bill of exchange. That being so, it was plain that the officers of the bank could not have been, and were not deceived by reason of the inadvertent indorsement of the bill of lading which was sent to Kemp. His lordship thought that the master of the rolls had come to a perfectly just and right conclusion in dismissing the bill with costs; and dismissed the appeal with costs.]

Solicitors for the plaintiffs: Messrs. *Clarke, Woodcock, and Ryland*.

Solicitors for the Bank of British Columbia: Messrs. *Freshfield*.

Solicitors for Messrs. Forbes & Co.: Messrs. *Rooks, Kenrick, & Harston*.

[Law Reports, 8 Chancery, Appeals, 22.]

L. C. and L.JJ. Nov. 8, 1872.

HOARE v. BREMRIDGE.

[1872 H. 141.]

Injunction — Policy of Assurance obtained by Misrepresentation — Action at Law — Conflict of Evidence — Concurrent Jurisdiction — Discretion of the Court.

A bill having been filed by an assurance company for the cancellation of a life policy as having been obtained by concealment and misrepresentation, a

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motion was made to restrain an action at law upon the policy, which had been commenced immediately after the filing of the bill:

Held (affirming the decision of *Malins*, V.C.), that although the court of Chancery had complete jurisdiction in such a case, yet the court of law was the most suitable tribunal for dealing with disputed facts respecting a policy of assurance; and the motion for an injunction was refused.

When proceedings are commenced at law and in equity respecting the same matter, if the nature of the claim of the plaintiff at law is such that he could only enforce it at law, the court of equity will be very reluctant, on an interlocutory application, to withdraw the case from the jurisdiction of the court of law.

THIS was an appeal from a decision of Vice Chancellor Malins⁽¹⁾. The bill was filed by the Sun Life Assurance Society, by its public officer, praying a declaration that a policy of assurance for £5000 on the life of Mrs. Formby was obtained by her by concealment and misrepresentation, and that the same was void, and ought to be delivered up to be cancelled, and that in the meantime the defendant, Thomas Julius Bremridge, the executor of Mrs. Formby, might be restrained from bringing any action against the plaintiff or the society in respect of such policy.

23] *From the statements in the bill it appeared that the original application for the policy in question was made by Dr. Lyle, who was also made a defendant.

The usual papers sent by the assurance office requiring particulars as to the life of the person intending to effect a policy were filled up by Mrs. Formby on the 8th of December, 1870. She stated that she was twenty-seven years of age, that her usual medical attendant was Arthur Kempe, whom she had last seen in the previous month of April, when he attended her during her confinement. This form was accompanied by the following certificate: "I do hereby certify that I am now in good health, that I do ordinarily enjoy a good state of health, that I am sober and temperate in my habits of life, and that I am not aware of any circumstance tending to shorten my life or to render an assurance on it more than usually hazardous. And I do hereby certify that I have not had occasion for medical advice or assistance during the last two years, excepting for confinement and passing ailments. Also I know no other medical practitioner so competent to certify as to my health, habits, and constitution as Arthur Kempe, to whom I have referred."

It was afterwards arranged that the assurance should be effected in the name of Mrs. Formby, Dr. Lyle not having sufficient interest, and she accordingly signed a declaration, dated the 13th of December, 1870, to the following effect:

"I, Maria Henrietta Formby, described in a proposal made by me to the Sun Life Assurance Society for assuring £5000 on

(¹) *Law Rep.*, 14 Eq., 522.

my own life, signed by me, and dated the 8th December, 1870, do hereby declare that my age does not exceed twenty-eight years, that I am now in good health, and that I ordinarily enjoy a good state of health; that I am sober and temperate in my habits of life, that the whole of the statements made by me in the said proposal are true, and that I am not aware of any other circumstance tending to shorten my life or to render an assurance on it more than usually hazardous; and this declaration is to be the basis of the contract between me and the said society; and if any untrue averment is contained in this declaration, or in the statements made in the said proposal in setting forth my age, state of health, habits, profession, occupation, or other circumstances, then all moneys which shall *have been paid to the said society upon account of the [24 assurance made in consequence thereof shall be forfeited.]

Dr. Kempe, the medical practitioner referred to by Mrs. Formby, sent a reply to the questions put to him by the assurance society on the 17th of December, in which he stated that her general state of health was good, that she was not afflicted with disease or disorder of any kind that he was aware of, and that he did not know of any circumstance which might be considered as tending to shorten her life or to render an assurance on it more than usually hazardous. Mrs. Formby was also examined by Dr. Budd, the medical referee of the assurance society, who reported that he found her to present every indication of a sound constitution, that she appeared to be in perfect health, and he considered her to be quite eligible for life assurance, in fact to be a first class life.

The policy, which was dated the 30th of January, 1870, was made under seal by three directors, in the ordinary form, and contained a clause providing that "should the assurance have been obtained through any misrepresentation as to the age, state of health, or description of the said assured, or should the said assured die by duelling, suicide, or the hands of justice, this policy, and everything appertaining thereto, shall cease, be void, and of none effect, so far as respects the said assured."

Mrs. Formby died on the 1st of February, 1872, having by her will, made in January, 1871, bequeathed the policy of assurance and all the residue of her property to Dr. Lyle, and appointed the defendant Bremridge, and another person, since deceased, her executors.

The bill alleged that the society had recently discovered that Mrs. Formby at the time of effecting the policy was not in a good state of health, and that she was afflicted with a disorder tending to shorten her life, and with serious disease, and that it was untrue that she was not aware of any circumstance

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tending to shorten her life or to render an insurance on it more than usually hazardous.

The charges in the bill entered into minute details respecting the disease from which Mrs. Formby was suffering when the proposal was made for insuring her life, which had arisen from injuries received in her last confinement, and from the effects whereof she died on the 1st of February, 1872.

25] *It was also alleged that when the proposal for insuring her life was made by Mrs. Formby she was well aware of the state of her health, and in order to induce the society to grant the policy, she concealed the fact of her not having recovered from her last delivery, and of her having been attended by another medical man, and that she did not inform the society or Dr. Budd that she was still suffering from disease; that if they had been so informed they would have refused to insure her life or undertake any risk upon such a life; but they had no information or intimation of such matters till after the death of Mrs. Formby.

This bill was filed on the 14th of June, and on the 21st of June the defendant Bremridge commenced an action against the society on the policy in the Court of Exchequer.

On the 30th of July, 1872, the plaintiffs moved before the vice chancellor for an injunction to restrain the action at law, which his honor refused with costs, and from this decision the plaintiffs appealed.

The *Solicitor-General* (Sir G. Jessel), Mr. Cotton, Q. C., Mr. Bush, and Mr. C. Bowen (of the common law bar), for the appellants:

There is no doubt about the jurisdiction of the court to set aside a policy of assurance on the ground of fraud and misrepresentation, and it has been repeatedly exercised: *Whittingham v. Thornburgh* ⁽¹⁾; *British Equitable Assurance Company v. Great Western Railway Company* ⁽²⁾; *Traill v. Baring* ⁽³⁾. Where the court has refused relief it has been in cases where there was no fraud or other circumstances entitling the plaintiff to equitable relief, as in *Lee v. Lancashire and Yorkshire Railway Company* ⁽⁴⁾.

There are, besides, in this case special grounds for granting an injunction. In the first place, our bill was filed before the action was commenced, and the onus is therefore on the defendants to show some special reason for seeking relief in a court of common law. There is really no conflict of evidence, for none of the important facts alleged by us are denied by the defendants' answer. There would be great inconveniences in allowing

⁽¹⁾ 2 VERN. 206.

⁽²⁾ 38 L. J. (Ch.), 314,

⁽³⁾ 4 D. J. & S., 318.

⁽⁴⁾ Law Rep., 6 Ch., 527.

both proceedings to go on independently of each other. In the second place, there *are misrepresentations in the declaration by Mrs. Formby, which are not strictly within the proviso in the policy, and therefore would not be considered in the action at law.

Mr. *Glasse*, Q.C., and Mr. *C. Hall*, for the defendants, were not called on.

LORD SELBORNE, L. C.: We all think that there is no sufficient ground in this case for differing from the decision of the learned vice chancellor. Not having heard the counsel on the other side, we do not, of course, decide, but we assume what is undoubtedly our own impression, according to our views of the law, that there is a good equitable case stated in this bill, which, if proved at the hearing, and not displaced, would entitle the plaintiffs to a decree. I have always understood the law of this court to be as explained by Lord Cottenham in the case of *Simpson v. Lord Howden* ⁽¹⁾, that if there be a legal defense to a written instrument depending on facts not appearing upon the face of the instrument, the party charged on that instrument with some liability may come into a court of equity to get rid of it, notwithstanding the legal defense, because the evidence of those extrinsic facts upon which the defense depends might not be forthcoming at all times and under all circumstances. That would apply even perhaps to cases that were not strictly cases of fraud. But, independently of that, where a case of fraud is alleged, this court has an original and unquestionable jurisdiction. We proceed, therefore, upon the ground that this court would have jurisdiction to deal with such a case as this at the hearing. But it is to be observed that it is only in an imperfect sense that a case of this kind is one of concurrent jurisdiction. Each party, to be an actor and to bring forward his own case, is not at liberty to choose this court or the court of law as he pleases, but each, if he would be plaintiff, must come the one into equity and the other into a court of law. Each is *rectus in curiâ*. The assured cannot come into equity to sue on this policy; the office, the insurers, can come into equity only before they are sued, to have delivered up to be cancelled. Each, therefore, is *suing, of necessity, in the proper court, and [27 in the only court in which he can sue, to have that which he claims as his right. But what the one claims as his right in equity would constitute his defense at law; what the other claims as his right at law would constitute his defense in equity. That is the true state of the case.

Now, that being so, it is manifest that all discretion which

⁽¹⁾ 8 My. & Cr., 87.

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would belong to this court in a case of concurrent jurisdiction, properly so called, must, *à fortiori*, belong to it in a case in which the whole matter cannot be drawn in the first instance into one jurisdiction, but can only be brought in its entirety into the equitable jurisdiction by imposing terms, the consent to which would be the price of its interference. This court could, undoubtedly, deal with such a motion as the present by saying, "We will grant the motion, if the plaintiff in equity consents to give judgment at law, or to do whatever else may be thought just, and we will refuse the motion, and let the action go on if the plaintiff in equity does not consent to do so." It is only by imposing terms partly depending on consent that it is possible in the present state of the law for this court to bring the whole matter into a single forum. Therefore I say that all discretion which would belong to the court in a case properly of concurrent jurisdiction, must, *à fortiori*, belong to it in a case of this kind, arising on an interlocutory application. And for my own part, I do not see any reason to doubt the correctness of a passage which I am about to read from Lord Truro's judgment in the case of the *South Eastern Railway Company v. Brogden* ⁽¹⁾ with regard to cases of concurrent jurisdiction in matters of account, which was the nature of the case then particularly before the court. The lord chancellor says: "There are many cases in which it seems to me, looking through the whole of the decisions, that this court would properly entertain jurisdiction on the matter, where, if the party making the claim proceeded at law, the court would not, as a consequence because it would itself exercise jurisdiction if appealed to, withdraw it from the jurisdiction of a court of law. I do not think the cases at all warrant that." That being so, no authority has been cited to us to show that this court has ever in a contested [28] question *determined that, in such a case as this, it would, by interlocutory motion, grant an injunction where a party claiming under a policy of insurance desired to have the opportunity of trying his right by an action at law, and would, in the ordinary course of proceeding, have that opportunity at an earlier date than the time at which it would be tried in the course of proceedings in equity.

It has been suggested by the solicitor general that in this case there is no conflict of evidence; but that argument seems to me to assume that the question of merits must be tried on the interlocutory application, and for the purpose of that application, in order to determine the question of the forum in which the trial is to take place. Such a course as that would be highly inconvenient; and it appears to me that a party in

(1) 8 Mac. & G., 28

the position of an executor coming forward and saying, "In the discharge of my duty I have brought this action, and I desire to have the opportunity of trying the question in the ordinary courts of law," is not obliged, in order to get the benefit of such rights as he may have at law, to go for the purpose of such an interlocutory motion into a preliminary rehearsal or trial of the question upon evidence. I am not, therefore, persuaded by that view. It has been also suggested in the course of the argument, that in questions like this, on policies of insurance, the assured prefers a jury, and the office prefers a judge. I do not think that we ought to pay any attention to the preference of the one party or the other. We are bound to take notice that, according to the ordinary course of law in this country, and having regard to the principles upon which trial by jury is established, the jury is not only the most usual, but the most suitable and proper forum for the trial of questions of this description. It is said that the effect of that will be, that while the case is being tried at law the suit will go on in equity. I do not think it is at all necessary that the expense of going into all the evidence in equity should be incurred, pending the trial at law. I can pretty well divine what the effect would be of a motion to dismiss for want of prosecution by a defendant in equity, if the only default of the plaintiff was in not proceeding in a manner which would involve, unnecessarily, double expense, while the matter was proceeding, as the defendant had elected that it should proceed, to trial at law.

Then, with respect to the rest, I am quite satisfied that, if it *were tried at law, this court would, in such a question as [29 that which is presented to us here, act on the verdict and judgment at law, and not disturb it. A new trial might be moved for at law, if necessary, and it would be granted or not as might be right. But this court would certainly not try over again, for the purpose of reversal, the question decided between the parties on the trial at law. Costs only would be the matter ultimately remaining to be provided for in equity; and as to costs, it may be assumed that this court would do justice.

In this case the balance of convenience appears to me clearly to be in favor of the trial at law. It is admitted that it will be more speedy; as far as I can judge, it would be less costly; and also that which is very properly adverted to by the learned vice-chancellor in his judgment, the present course of procedure at law, as compared with that in equity, gives an advantage which in cases of this kind is of the greatest value, the advantage of having all the evidence orally taken, and all the cross-examination without rehearsal of any kind. My voice, therefore, is in favor of affirming the learned vice-chancellor's judgment.

SIR W. M. JAMES, L.J.: I entirely concur in the affirmance of the decision of the vice-chancellor, and I think it necessary only to add, that I also equally concur in the judgment of the lord chancellor just pronounced, and in the judgment which Mr. Cotton read to us of the vice-chancellor.

SIR G. MELLISH, L.J.: I am entirely of the same opinion;

Solicitors for the plaintiffs: Messrs. Ranken, Ford, Longbourne & Longbourne.

Solicitor for the defendant: Mr. J. Elliot Fox.

[Law Reports, 8 Chancery Appeals, 80.]

L.J.J. Nov. 25, 1872.

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*LOOKING V. PARKER

[1871, L., 79.]

Mortgage—Express Trust—Conveyance upon Trust to sell in default of Repayment of Advance—Statute of Limitations (3 & 4 Will. 4, c. 27), ss. 25, 28—Term of Years—Conveyance of Fee—Implied Surrender.

A security in the form of a trust for sale is a mortgage within the meaning of the 28th section of the statute of limitations.

Before 1829 L. had demised two estates to P. for long terms of years by way of mortgage. On the 11th of February, 1829, P. made to L. a further advance, and L., by a deed to which P. was a party, but not a conveying party, conveyed the fee in those estates and another estate to C., upon trust for P., his heirs, executors, administrators, and assigns, nevertheless upon the further trusts thereafter declared; which were, to permit L. to continue in possession and receipt of rents till the 11th of August, and if L. should then repay the further advance with interest, and the other mortgages charged on the property and thereafter specified, to reconvey to L., his heirs or assigns; but in default of payment, then that C., his heirs or assigns, should immediately, or at their or his discretion, enter into possession, and sell the estates, and stand possessed of the proceeds on trust, in the first place, to pay costs, then the sums due to P., with interest, and a sum due on mortgage to another person with interest, and to pay the surplus to L., his executors, administrators, or assigns. L. at the same time attorned tenant to P. Default having been made in payment, P. entered into possession in 1832, and thenceforth received the rents and let the property. Sales were subsequently made of parts of the property, the last being in 1848, and C. conveyed to the purchasers, P. being a party, and it was agreed that all terms should be assigned in trust to attend. In 1871 L.'s heir-at-law filed a bill to have the trusts of the deed of 1829, carried into execution:

Held (reversing the decision of the master of the rolls), that the deed of 1829 did not create a trust of the estate for the benefit of the mortgagor which he could enforce, so as to bring the case within the 3 & 4 Will. 4, s. 27, c. 25, but was a mortgage within the meaning of sect. 28 of the same statute:

Held, also, that there was no implied merger of the terms created by P.'s earlier securities, and that those securities remained in force notwithstanding the deed of 1829:

Held, further, that although the deed created an express trust in favor of L. of the surplus proceeds of sale after paying incumbrances, no relief could be given

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to the plaintiff on this ground, as it was not alleged, nor was there anything to lead to the supposition, that there had ever been any such surplus:

Held, therefore (reversing the decision of the master of the rolls), that the bill must be dismissed with costs.

This was an appeal by the defendants from a decree of the master of the rolls.

*William Locking, being entitled under his father's will [31 to the fee simple of certain real estate in the county of Lincoln, subject to the payment of an annuity, by indenture dated the 10th of May, 1822, demised the same to Lysimachus Parker for a term of 1000 years by way of mortgage, to secure the repayment of the sum of £800 with interest. On the 10th of November, 1824, William Locking charged the estate comprised in the indenture of the 10th of May, 1822, with the payment to Lysimachus Parker of £100 and interest, and on the 25th of August, 1826, he again charged the same estate with the payment to Lysimachus Parker of a further sum of £100, and interest.

By an indenture dated the 25th of April, 1828, William Locking again charged the estate comprised in the indenture of the 10th of May, 1822, with the payment to Lysimachus Parker of £100 and interest; and he also demised certain other real estate which he had purchased on the 15th of May, 1822, to Lysimachus Parker for a term of 2000 years, by way of further security for the repayment of the last mentioned £100 and interest. By an indenture dated the 10th of December, 1828, William Locking charged the estates comprised in the indentures of the 10th of May, 1822, and the 25th of April, 1828, with the payment to Lysimachus Parker of the £1100 owing to him on the security of the indentures already stated, and of a further advance of £100, and of interest thereon.

By indentures of lease and release, dated the 10th and 11th of February, 1829, the release being expressed to be made between William Locking of the first part, Lysimachus Parker of the second part, and Cornelius Parker of the third part, which recited only an agreement by Lysimachus Parker to advance to Locking £560, upon having the same, with interest, secured upon the premises intended to be assured by the present deed, William Locking, by the direction of Lysimachus Parker, and in consideration of a sum of £560 advanced to him by Lysimachus Parker, conveyed the fee simple of the estates comprised in the indentures of the 10th of May, 1822, and the 25th of April, 1828, and of a third estate, which he had purchased in February, 1829, unto and to the use of Cornelius Parker, his heirs and assigns, in trust for the said Lysimachus Parker, his heirs, executors, administrators, and assigns, [32

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but nevertheless upon the further trusts, and for the ends, intents, and purposes thereafter expressed and declared of and concerning the same. And it was declared that Cornelius Parker and his heirs should stand possessed thereof upon trust to permit William Locking to take the rents and profits thereof until the 11th of August then next ensuing (being the day fixed for the repayment of the advance of £560); and in case William Locking should then repay the £560 with interest, and also the other sums thereafter specified and then legally charged by the said William Locking upon the said hereditaments, or on some part thereof, to reconvey the said hereditaments to William Locking, his heirs or assigns, at his or their cost; but in case Locking, his heirs, executors, or administrators should make default in payment of the said sums, then that Cornelius Parker, his heirs or assigns, should immediately thereupon, or at any time thereafter at his or their discretion, enter into possession of the hereditaments, and receive the rents and profits thereof, and at his or their sole authority absolutely sell and dispose of the same hereditaments, or any part thereof, and the fee simple and inheritance thereof, either together or in parcels, and either by public sale or private contract; and for that purpose make all necessary contracts, conveyances, &c. And it was declared that every sale, &c., should be binding on Locking, his heirs and assigns, without his or their concurrence, and that the receipts of Cornelius Parker, his heirs or assigns, should be good discharges. And it was declared that Cornelius Parker, his heirs, executors, administrators and assigns should stand possessed of the moneys to arise by the sale of all or any part of the said hereditaments, and of the rents until sale, upon trust, in the first place, to reimburse himself or themselves the expenses of such sale, and in the next place to pay to Lysimachus Parker the £560 with interest, and the sum of £1200, secured by the five several mortgage deeds therein referred to (being the instruments already stated), with interest thereon, and also to pay to one Robert Epworth the sum of £180 due on the security of certain indentures of mortgage of the 17th of March, 1824, and the 27th of April, 1827, and to pay the surplus to William Locking, his executors, administrators, or assigns. This deed was executed by William Locking and Lysimachus 33] Parker, but not by Cornelius *Parker. On the same 11th of February, 1829, William Locking executed a declaration of attornment to Lysimachus Parker of all the property comprised in the deed of even date. Default was made in payment of principal and interest, and Lysimachus Parker entered into possession of the property and the receipt of the rents in or previously to March, 1832.

By an indenture dated the 6th of April, 1832, and made between Cornelius Parker of the first part, Lysimachus Parker of the second part, William Bassett of the third part, and Samuel Frought of the fourth part, after reciting that Cornelius Parker, as trustee for sale of the hereditaments thereafter mentioned and described, named, and appointed in the indenture of release of the 11th of February, 1829, had agreed with William Bassett for the sale to him of the hereditaments thereafter mentioned and described at the price of £145, in consideration of the said sum, Cornelius Parker granted and assured the hereditaments therein described (being part of the hereditaments comprised in the indentures of the 10th and 11th of February, 1829) to William Bassett in fee, and Cornelius Parker covenanted to produce the title deeds to the property (including those by which the terms of 1000 years and 2000 years were created), and Lysimachus Parker covenanted to indemnify William Bassett against an annuity charged on the property by the will of the father of William Locking, and against any claim to dower by William Locking's wife; and it was agreed between all the parties thereto that all persons possessed of any terms of years subsisting in the property in trust to attend the inheritance should stand possessed thereof and assign the same in trust for William Bassett, his heirs and assigns, and to protect the property from such dower, and all other charges and incumbrance, if any; and until such assignments, the same terms should attend the inheritance. This conveyance was executed by Cornelius and Lysimachus Parker.

It appeared that the sale to Bassett was made by auction; that Cornelius Parker, on the occasion of such sale, addressed a letter to the auctioneer in which he described himself as owner of the estate intended to be sold, and gave notice that he had appointed Lysimachus Parker to bid at the sale on his behalf; and in the agreement *signed by vendor and purchaser [34 Cornelius Parker was described as the trustee and owner of the estate.

Similar conveyances of other parts of the hereditaments comprised in the indentures of the 10th and 11th of February, 1829, were executed in 1839, 1840, and 1848.

In August, 1846, on the occasion of an inclosure of common lands, a piece of land comprising 21A. 1R. 0P. was allotted to Cornelius Parker, as trustee for Lysimachus Parker, in respect of the hereditaments comprised in the indentures of the 10th and 11th of February, 1829.

Subsequently to the time when Lysimachus Parker entered into receipt of the rents of the property, he from time to time entered into agreements for letting parts of the property to

tenants, and on such occasions he appeared to have acted without consulting Cornelius Parker. So far as appeared, Lysimachus Parker, from the time of entering into receipt of the rents as aforesaid, continued to receive the same down to the time of his death, which took place in August, 1860. By his will he devised the unsold portions of the property comprised in the indentures of the 10th and 11th of February, 1829, to Cornelius Parker and the Rev. J. P. Parkinson upon trust for sale, and he appointed them executors of his will. These trustees, upon the death of the testator, entered into and had since continued in possession of the property so devised.

William Locking paid no interest on the sum due from him to Lysimachus Parker subsequently to 1830. He died in June, 1870, intestate, and the plaintiff was his heir-at-law and legal personal representative.

In May, 1871, the plaintiff filed the bill in this suit against Cornelius Parker and the Rev. J. P. Parkinson, alleging that all moneys due to Epworth under the deed of the 11th of February, 1829, had long since been paid and satisfied; and praying that the trusts of the same deed might be carried into execution under the direction of the court; for an account of what was due to the defendants for principal, interest, and costs upon the security of the same deed; for accounts of the purchase moneys arising from the sale of parts of the property, and of the rents and profits of the unsold portion thereof received [35] by the defendant Cornelius *Parker, or by any person by his order or for his use, or which without his negligence might have been so received; for a sale of the unsold portions of the property comprised in the indenture of the 11th of February, 1829, and payment of the proceeds to the persons entitled thereto under that indenture.

The cause came on to be heard before the master of the rolls, who made a decree in favor of the plaintiff ⁽¹⁾.

⁽¹⁾ May 27.

LORD ROMILLY, M. R.:

The point to be determined in this case relates to the proper construction to be put on the Statute of Limitations of the 3 & 4 Will. 4, c. 27; whether the 28th section of the statute bars the right of the plaintiff, or whether, under the 25th section, Cornelius Parker was at his decease a trustee for the plaintiff. The facts are these:—His Lordship then stated them, and read the 25th and 28th sections of the act 3 & 4 Will. 4, c. 27, and continued:—] It is impossible, in my opinion, on referring to the facts I have mentioned, not to come to the con-

clusion that, under the deed of the 11th of February, 1829, Cornelius Parker was a trustee of these estates and and hereditaments for the purposes mentioned in the deed, the last of which was a trust for William Locking, his executors, administrators, or assigns. It is also impossible to say that Cornelius Parker did not accept the trusts; it is true that he did not execute the deed in question, but he took upon himself to act as trustee, and it is expressly stated that he did so in the deed of 1833, which was executed by him, and in that character he conveyed the hereditaments then sold to the purchasers. He described himself as

*The *Solicitor-General* (Sir G. Jessel), and Mr. *Nabler* (Mr. [36 *Snithgate*, Q.C., with them), for the appellants:

The question is, whether this was a deed creating an express trust within the meaning of sect. 25 of the Statute of Limitations, or a mortgage with sect. 28. The statute does not define what

trustee in the agreement executed on the occasion of the sale, and he was, I think, also in possession of the estate itself as trustee, for I am of opinion that on the authority of *Garrard v. Tuck* (8 C. B. 231) the possession of Lysimachus Parker, in the circumstances here set forth, must be treated as possession under the deed of the 11th of February, 1829, and consequently as the possession of the trustee who might have called on him to deliver up possession, and might himself have been called upon to account for the receipt of the rents and profits. If a suit had been instituted to recover the property within two or three years after the execution of the deed of February, 1829, it is clear that it would not have been a suit to redeem, but a suit to execute the trusts of that indenture. If all the property had been sold and the money paid into court, it is clear that the trust would have permanently attached to the money until all the trusts were executed, and that the execution of them would have been enforced by this court. It can make no difference that only a portion was sold and the produce of that portion paid to Lysimachus Parker, which went in discharge *pro tanto* of the mortgage money due to him; it was, in fact, a partial execution of the trusts of the indenture. I am unable to fix any time at which the twenty years mentioned in the 28th section of the statute began to run. It would also, I think, be impossible for Lysimachus Parker or his representative to set up the terms of 1000 and 2000 years as a bar to the plaintiff's claim, for the terms were, in fact, superseded by the provisions of the deed of the 11th of February, 1829, which are inconsistent with the subsistence of these terms (*Nickells v. Atherstone*, 10 Q. B. 944), and they were also, as it appears, assigned to the purchasers from Cornelius Parker to attend the inheritance. I think all the cases cited for the defendant, and on which he relies, are distinguishable. The case of *Burroughs v. M'Creight* (1 J. & Lat. 290) is a case between tenants in common and co-parceners, and there was clear adverse possession. In this case I think it clear

that the land was vested in Cornelius Parker as trustee upon express trust, and that at no period did time begin to run to bar the real owners, William Locking and his heirs, except as regards such pieces of the land as were conveyed by Cornelius Parker to purchasers for value when first adverse possession began.

I am of opinion, therefore, that the plaintiff is entitled to a decree declaring that the trusts of the indenture of February, 1829, ought to be carried into execution so far as they remain unexecuted, and also that the defendant Cornelius Parker was a trustee for William Locking, his heirs and assigns, of the remainder of the estates after paying the sums stated in the deed, and that he must account accordingly, and that the estate of Lysimachus Parker must account for what, if anything, on taking such account, shall appear to have been received by him in excess of what he was entitled to under the trusts of the said indenture. I thought at first I ought to make a decree without costs, considering the time which has elapsed: but the general rule is strict that, where a trustee refuses to account, and disputes the right of his *cestui que trust* to an account, he must pay the costs of resisting such an account. And this case is peculiar, for a lapse of upwards of forty years has taken place without William Locking and his heirs calling on the trustee to account. But still I think I must follow the rule, as it is the duty of a trustee to account without being called upon to do so; and as Lysimachus Parker has got all the benefit of the transaction, I think that his estate ought to bear the costs. I think, therefore, that on taking the account of his estate, though I have no power in this suit to make such a decree, the defendant ought to be allowed the costs of resisting this suit; but as I have no jurisdiction over the estate in this suit, I shall only make the decree, with costs up to and including the hearing to be paid by Cornelius Parker, but the costs of taking the account will fall on the trust estate itself.

a mortgage is, and we say this is a mortgage. To arrive at the same result as the master of the rolls it must be held that this instrument created such a trust, that at the end of six months the mortgagor could have compelled a sale whether the mortgagee liked it or not. This was certainly not the intention of 37] the parties *but supposing there was such a trust, it only extended to the reversions expectant on the terms of 1000 and 2000 years, so far as regards the properties comprised in them. The trust is for the benefit of the mortgagee; and a discretion as to sale is given, which is to be exercised by him: *Kirkwood v. Thompson* (1). The instrument then is really a mortgage with a trust of sale, which, except as regards foreclosure, does not differ from a power of sale, and there is a complete bar under sect. 28. We do not question *Garrard v. Tuck* (2). It is true, indeed, that a *cestui que trust* may oust his trustee: *Burroughs v. M'Creight* (3); but we admit that here the statute could not run in favor of Lysimachus Parker so as to bar Cornelius Parker, for the property was enjoyed according to the rights of the parties. We say, however, that the intervention of Cornelius, to whom the property was conveyed to prevent a merger of the terms, leaves the case, as regards the Statute of Limitations, just as if the estate had been conveyed to Lysimachus. The sales could not operate as part payment, or acknowledgment, so as to stop the statute: *Batchelor v. Middleton* (4); *Lucas v. Dennison* (5). The terms are subsisting, and *Nickells v. Atherstone* (6), *Thomas v. Cook* (7), *Davidson v. Gent* (8), *M'Donnell v. Pope* (9), do not show the contrary.

Mr. Fry, Q.C., Mr. Marcy (Mr. Charles Hall with them), for the plaintiff:

We contend that this is a trust deed, and something more than a mortgage. There is first a direction of trust for Lysimachus, but followed by "nevertheless," showing that the trusts were modified

[The LORD JUSTICE JAMES: Are you not on the same footing in this respect as if there had been no prior mortgage and the property had been conveyed to Lysimachus on the same trusts?]

We submit not; it cannot be concluded that Cornelius was introduced only to prevent a merger, for deeds in the present 38] form *are sometimes used when there is no prior mortgage. There is a trust in favor of Epworth, of which he could claim the benefit, which shows that the deed is not merely a mort-

(1) 2 H. M. 392; 2 D. J., & S., 613.

(2) 8. C. B., 231.

(3) 1 J. & Lat., 290.

(4) 6 Hare, 75.

(5) 13 Sim., 584.

(6) 10 Q. B., 944.

(7) 2 B. & A., 119.

(8) 1 H. & N., 744.

(9) 9 Hare, 705.

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gage. The trust are such as to effect a conversion : *Re Underwood* ⁽¹⁾; *Jefferys v. Dickson* ⁽²⁾. The case of *Kirkwood v. Thompson* ⁽³⁾ merely decided that, for a particular purpose, the person to whom property was conveyed in this way was not a trustee. A trust of a similar description was held to exclude the *Statute of Limitations* in *Cox v. Dolman* ⁽⁴⁾ and *Shaw v. Johnson* ⁽⁵⁾. The terms are merged, the intention evidently being that the money should be raised only by means of the trust of the deed, which is inconsistent with the continuance of the terms.

SIR W. M. JAMES, L.J. : There are only two points to be determined in this case, on both of which it is my misfortune to differ from the master of the rolls : one is, whether this is a mortgagor's suit against the mortgagee; the other is as to whether there was any surrender of the old mortgage terms.

It is quite clear that in this deed there is no express surrender of the terms. They are not referred to as intended to be surrendered, and the gentleman who had the terms in him did not concur in conveying, so as to merge them in the inheritance. It has been urged, however, that there is an implied surrender of them, by virtue of the provisions of the deed. Now, it is always to be borne in mind that when the court implies from a deed anything which is not expressed in it, this is done for the purpose of getting rid of some technicality which interferes with what is obviously the plain intent and meaning of the parties to the transaction. Of course if we could see from the deed itself that it was the intention of the parties that the earliest securities should not be kept on foot, we might give effect to that intention. To my mind Lysimachus Parker would have been demented if had surrendered his terms, and so lost the benefit of his old securities, all which are referred to in this deed, without any expression of an intention to merge *them. I am of opinion, therefore, that there was no sur- [39
render or merger of the existing terms, and that there was nothing in the deed which deprived the mortgagee under the earlier deeds of his rights under them. If he had a right to foreclose before, he had a right to foreclose afterwards. If he had a right to assign before, he had a right to assign afterwards. It is possible that the deed of February, 1829, may have operated as a bargain that the old securities should not be enforced during the period of six months, but the court would have no difficulty whatever in giving effect to such a bargain without

⁽¹⁾ 8 K. & J., 745.

⁽²⁾ Law Rep., 1 Ch., 188.

⁽³⁾ 2 H. & M., 892.

⁽⁴⁾ 2 D. M. & G., 592.

⁽⁵⁾ 1 Dr. & Sm., 412.

in any way further interfering with those securities. Subject to that, it appears to me that the rights of the mortgagee under the old deeds remained unaffected.

Then the next point which has been argued before us is, whether the deed of February, 1829, standing by itself, is anything more than a mortgage deed with a power or trust for sale. I am of opinion that it is nothing more than a common mortgage security taken by way of a trust for sale, and taken, for very obvious reasons, in the name of a third person. Now, if it be a mere mortgage security, it appears to me to fall entirely within the language of the late lord chancellor, when Vice Chancellor Wood, in *Kirkwood v. Thompson* ⁽¹⁾: "I see no difference between the case of an ordinary mortgage and that of a trust for sale. It is not such a trust as would enable the mortgagor to file a bill to have the property sold, because the discretion as to selling or not is in the mortgagee alone. On the other hand, the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale. But these distinctions make no substantial difference in his position, which is that of mortgagee." If I may be permitted to say so, I entirely concur not only in those words but in the spirit of those words, that it is not for a court of equity to be making distinctions between forms instead of attending to the real substance and essence of the transaction. Whatever form the matter took, I am of opinion that this was solely a mortgage transaction between the mortgagor and Lysimachus Parker.

It is said, however, that the introduction of a third person, Cornelius Parker, as trustee, takes the instrument out of the category of a mere conveyance to a mortgagee on trust for sale. In many cases of mortgage by way of conveyance on trust for sale the conveyance is, for some reason or other, made to a trustee. In the present case I am of opinion that by the very words of the deed itself the contention that the intervention of a trustee makes any difference is excluded, for the conveyance is made to Cornelius Parker in trust for Lysimachus Parker, his heirs, executors, administrators, and assigns, which clearly shows the meaning of the parties to be, that all things done by Cornelius Parker under the subsequent trusts are to be done by him as the nominee and trustee and under the direction of Lysimachus Parker, the object of introducing Cornelius Parker being to keep the terms vested in Lysimachus from being merged in the freehold. I am of opinion that the mortgagor could not have called upon Cornelius to enter. I am of opinion that he could not have called upon Cornelius to sell, and that the right of Locking from the beginning and throughout was

(1) 2 H. & M., 892.

simply the right of a mortgagor to redeem. That being so, his right was barred by the Statute of Limitations, possession having been taken by Lysimachus Parker more than twenty years before the filing of the bill, and there having been no subsequent acknowledgment within the meaning of the statute.

It is said, however, that there is an express trust in the deed with reference to the sale moneys. The solicitor general, in his argument, admitted that there might be an express trust with reference to the sale moneys exactly in the same way as where a mortgagee sells under the powers of a common mortgage. In that case when the estate has been sold there is an express trust of the surplus money for the mortgagor. If, then, there had been any allegation in this bill, or any evidence, that there were any surplus moneys, the bill might have been sustained for those surplus moneys. But that is not the frame and intention of the bill. The bill prays the execution of the trusts of the indenture, and is in substance a bill for the redemption of the estate, which, under the circumstances, cannot, according to the view we have taken, be sustained; and I am of opinion that we cannot go out of our way to give any relief in respect of this trifling matter, a case for which is not made in the bill, and an inquiry into which *would simply involve both the [41] parties in a very idle and useless expense.

I am of opinion, therefore, that the bill entirely fails, and must be dismissed with costs.

SIR G. MELLISH, L.J.: I am of the same opinion.

Solicitors: Messrs. *Dickson & Lucas*; Messrs. *Collyer-Bristow, Withers, & Russell*.

[Law Reports, 8 Chancery Appeals, 41.]

L.JJ. Nov. 8, 1872.

In re EUROPEAN BANK.*

AGRA BANK CLAIM.

Bankers' Account — Separate Accounts — Deposit of Securities — Lien for General Balance.

The O. Bank kept three accounts at the A. Bank, namely, a loan account, a discount account, and a general account. They from time to time received advances from the A. Bank, which were entered in the loan account, and to meet which they deposited securities with the A. Bank. In the course of the transactions the O Bank deposited three bills of exchange with the A. Bank, accompanied by a letter stating that they proposed to draw upon them for £10,500, but that as their credit would not afford a margin to that extent, they sent these bills as a collateral security. The O. Bank became insolvent and was wound up:

*See *Garnett v. McEwan* L. R., 8 Exchequer, 10 ante p.

The Oriental Commercial Bank was largely indebted to Agra and Masterman's Bank on all their three accounts, and the Agra Bank had received dividends on the joint balance. By means of these *dividends and the securities which they held, all [43 the balance due on the loan account was covered, but a balance still remained due on the general account.

They now claimed a lien on the bills for £4500, so far as they were not required to cover the balance of the loan account, for the deficiency on the general account, and took out a summons in the winding-up of the European Bank to enforce their claim.

It appeared from the books of the Agra and Masterman's Bank that the securities deposited from time to time by the Oriental Commercial Bank were applied to cover the balance due on the loan account, without regard to the particular transaction in respect of which they were deposited, but there was no evidence that they were ever treated as applicable to the balance due on the other two accounts.

It also appeared that the bills had been accepted by the European Bank for the accommodation of the Oriental Commercial Bank.

The vice-chancellor held that the Agra Bank were entitled to retain the bills to answer the general balance, and allowed the claim; and from this decision the liquidator of the European Bank appealed.

Mr. Glasse, Q.C., and Mr. *Graham Hastings*, for the appellant, contended that the letter of the 4th of May, 1866, and the mode in which the accounts were kept, took the case out of the rule that a banker has a lien, for his general balance, on the securities deposited with him. In this case the bills were deposited for a specific purpose. They were accommodation bills, and the Agra Bank could only prove for them to the extent to which they gave value for them; and could not hold them for any other purpose.

Mr. *Higgins*, Q.C., and Mr. *Jackson*, for the liquidator of the Agra Bank, were not called on.

SIR W. M. JAMES, L.J.: I am of opinion that the order of the vice-chancellor is correct. If the matter depended simply upon the letter of the 4th of May, 1866, possibly there might have been some ambiguity which would *have entitled the [44 European Bank to say to the Agra Bank, "These are accommodation bills. You never gave any value for them, except by means of that particular transaction, and that value has been repaid." But when we look at the books, it is clear that there was no particular reason for treating these three accounts as distinct matters. It was only for convenience that the loan ac-

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count was kept separately. It was admitted by the appellant that the bills in question might have been applied to discharge the balance of the loan account, without regard to the particular transaction in respect of which they were deposited. In truth, as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account.

I am of opinion that the Agra Bank have a right to hold these bills as security for the general account. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.: I am of the same opinion.

Solicitors: Messrs. *Argles & Rawlins*; Messrs. *Ashurst, Morris, & Co.*

[Law Reports, 8 Chancery Appeals, 45.]

LJJ., Nov. 12, 1872.

45] **In re CRENVER AND WHEAL ABRAHAM UNITED MINING COMPANY. Ex parte WILSON.*

Companies Act, 1862, s. 165—Loss by Misconduct of Director—Winding up—Allotment to Infant.

A director of a company induced three of his children, who were minors, to apply for shares. Shares were allotted to each, and he gave them money to pay the sums payable on allotment. All the shares in the company were allotted. The company never paid any dividend, and an order for winding it up was made before any of the children had attained twenty-one. The infants were placed on the list of contributories, and an order was made against each for payment of an arrear of calls, but, their infancy having been discovered, no attempt was made to enforce it:

Held (affirming the order of the vice warden of the Stannaries), that the father was liable to pay the amount of these calls, as a loss occasioned to the company by his breach of duty as director in having shares allotted to infants.

THIS was an appeal from a decision of the vice warden of the Stannaries.

The Crenver and Wheal Abraham United Mining Company was registered in 1863, under the Companies Act, 1862, with limited liability. The capital consisted of 30,000 £5 shares. In November, 1863, the appellant, David Wilson, who was the registered holder of several hundred shares, was one of the directors. Believing that the concern would be prosperous, he advised his four children to apply for shares. They accordingly applied, and on the 5th of December shares were allotted to each. One child was of full age, the other three were minors:

Twenty shares were allotted to each of the minors. The appellant paid by way of advancement to his children the sums which were payable on allotment. In 1865 the appellant purchased 500 more shares for himself, and they were registered in his name. He retained all his shares till the winding up.

The company never paid any dividend, and in November, 1866, an order was made for winding up. In April, 1867, the three minors were placed on the list of contributories, and in May a peremptory order was made upon each for payment of £40 for an arrear of calls. It having, however, been discovered [46] that they were still under age at the time of the winding up order, no attempt was made to enforce these orders; but in 1870 an application was made to place the name of the appellant on the list of contributories. This was abandoned, and ultimately a motion was made, under the Companies Act, 1862, s. 165, on behalf of the registrar as liquidator, that Wilson should be ordered to contribute to the assets of the company such sum of money as the court should think just, by way of compensation for the loss sustained by the company by reason of the three children not being liable to pay the calls.

The vice warden made an order that Wilson should pay to the registrar £120, being the amount of unpaid calls on the shares allotted to the three infant children, and should pay the costs. Wilson appealed from this order.

It was admitted that Wilson had paid all calls which had been made on the shares standing in his own name, and that he had not used the names of his children as nominees for him, in order to avoid liability, but intended them to have, for their own benefit, the shares allotted to them. The appeal was opened under the impression that a large proportion of the shares in the company had never been allotted, but on examination of the share register, which was produced in court, it turned out to be the fact that all of them had been allotted.

Mr. *Miller*, Q.C., and Mr. *Everett*, for the appellant: We submit that sect. 165 of the Companies Act does not apply to a case like this, but only to misapplication of funds, or some other act of such a nature that a trustee must account to a *cestui que trust* in respect of it. There is no sufficient proof of loss. It ought to be shown that solvent persons applied for shares after all the shares had been allotted.

[They referred to *Ebbel's Case* (*) and *King's Case* (†).]

Mr. *Fry*, Q.C., and *Joseph Dixon*, for the liquidator, were not called upon.

*SIR W. M. JAMES, L.J.: The 165th section of the Com- [47]

(*) Law Rep., 5 Ch., 802.

(†) Law Rep., 6 Ch., 190.

panies Act, 1862, which seems to me a very beneficial provision, enacts that where it appears in the course of the winding-up of a company that any officer of such company has been guilty of any misfeasance, or breach of trust in relation to the company, the court may examine into his conduct, and compel him to contribute such sums of money, by way of compensation, in respect of such misfeasance or breach of trust, as the court thinks just. Here the appellant was a director of the company, and as such director he allowed shares to be allotted to his three infant children, who remained on the register up to the time of the winding-up. Owing to their infancy no contributions could be obtained in respect of their shares under the winding-up. The vice-warden of the Stannaries held, that it was just to make the appellant pay what the children, had they been adult shareholders, would have been compelled to pay, and I am of opinion that he came to a perfectly right conclusion. It certainly was a breach of the appellant's duty as director, to take a part in having shares allotted to infants. It was argued that there was not sufficient proof of the company having sustained a loss by this breach of duty; but it appears that all the shares were taken, so the fair inference is, that if these shares had not been allotted to the infants, they would have been taken by somebody else, and we cannot speculate upon the possibility that the takers would have turned out insolvent. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.: I am of the same opinion.

Solicitors: Messrs. *Courtenay & Croome*; Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Hodge, Hockin, & Marrack, Truro*.

[Law Reports, 8 Chancery Appeals, 48.]

L. JJ. Nov. 7, 1872.

48] *Ex parte HARRIS. In re PULLING.

Bankruptcy—Bill of Sale—Registration—17 & 18 Vict. c. 36—Order and Disposition.

On the 23d of September H. discounted for P. two bills of exchange payable on the 12th of October, and P. gave H. a bill of sale as security, requesting him not to register it unless the bills were dishonored at maturity. H. accordingly did not register it. On the 12th of October the bills were dishonored, on which H. took them up and P. gave him two fresh bills for the same amount, and a new bill of sale of the same chattels. On the 30th of October the new bills were dishonored, and H. gave directions to take possession of the chattels. Early on the 31st a broker went to take possession, but could not on that day get into the house where they were.

On the same day the bill of sale was registered, and P. committed an act of bankruptcy by filing a petition for liquidation, on which he was subsequently adjudged bankrupt. On the 1st of November H. obtained possession of the goods:

Held (reversing the decision of the registrar), that the goods belonged to H. and not to the trustee in bankruptcy, for that they were not in the order and disposition of the bankrupt with the consent of the true owner at the time of the act of bankruptcy; that the Bills of Sale Act did not apply; and that the transaction was not invalid as being a scheme to evade the provisions of that act.

This was an appeal by Harris, the holder of a bill of sale, from an order of Mr. Registrar Spring Rice sitting as chief judge.

On the 23d of September, 1871, Harris discounted for Pulling two bills of exchange for £300 and £100, payable on the 12th of October, 1871, and Pulling gave him a bill of sale of that date on the furniture in Pulling's house. Pulling at the same time requested Harris not to register the bill of sale until after the bills became due and were dishonored. On the 12th of October, Pulling being unable to meet the bills, Harris was obliged to take them up, and as Pulling could not repay him, he requested Harris to renew the bills which Harris agreed to do. Pulling accordingly, on the 12th of October, accepted and gave to Harris two fresh bills of exchange for £300 and £100, payable on the 30th of October, and gave him a bill of sale dated the 12th of October on the above-mentioned furniture.

*On the 30th of October, when the bills became due, they [49 were dishonored; and on the same day Harris instructed a broker to go and take possession of the furniture. The broker went to the house at eight o'clock in the morning of the 31st, but could not obtain admission, and in the course of the day Pulling filed a petition for liquidation. The broker went again to Pulling's house at least twenty times in the course of that day, but could not get in, and at night left men to watch the house. They watched it all night, and on the morning of the following day, the 1st of November, a window being found unfastened, an entrance was effected, and the goods were removed. On the 1st of November one Stewart was appointed receiver and manager. Resolutions for liquidation were not passed, and on the 24th of November a petition for adjudication was filed, under which Pulling was adjudicated bankrupt, and Stewart was appointed trustee. The bill of sale of the 12th of October was registered under the Bills of Sale Act on the 31st of October.

The goods were, by consent, sold under an order of the court, without prejudice to the question who was entitled to the proceeds, and the trustee then applied to the court of bankruptcy for an order declaring that the bill of sale was fraudulent and void as against the trustee, or that the goods were in the order and disposition of the bankrupt with the consent of the true owner. The registrar held that the trustee was entitled to the

proceeds on the ground that the goods were within the order and disposition of the bankrupt, and made an order accordingly.

Mr. *De Gex*, Q.C., and Mr. *Gibbons*, for the appellant, referred to *Smith v. Topping* ⁽¹⁾; *Burn v. Carvalho* ⁽²⁾; *Hollingsworth v. White* ⁽³⁾; *Ex parte Cohen* ⁽⁴⁾.

Mr. *Kay*, Q.C., and Mr. *Finlay Knight*, for the trustee :

The transaction is void, as a scheme to evade the Bills of Sale Act (17 & 18 Vict. c. 36) : *Ex parte Cohen* ; *Ex parte Fisher* ⁽⁵⁾ ; bankruptcy act, 1869, s. 95 ; *Slansfield v. Cubitt* ⁽⁶⁾.

50] *SIR W. M. JAMES, L.J. : This is an appeal from a decision of the registrar on a question of order and disposition. Every other point raised in the case was decided by him in favor of the appellant ; but he was of opinion that the goods were in the order and disposition of the bankrupt at the time of his committing an act of bankruptcy. I am unable to concur in that view of the facts. The appellant, before the act of bankruptcy was committed, did all he could to obtain actual possession of the goods, and was only prevented from so doing by being excluded from the house where they were.

But it is said that the assignment to the appellant was void. It is urged, first, that though the first bill of sale was ineffectual against the trustee, because it was not registered, it had passed the property, so that the second bill of sale was inoperative, because the debtor had no property upon which it could operate. I think that if authority were wanted, the case of *Hollingsworth v. White* ⁽³⁾ completely disposes of this argument. In the next place, it was argued that this was a device to evade the Bills of Sale Act. At present I see no evidence of any device of the kind. The bankrupt applied to Harris for money. Harris said, "Give me a bill of sale as security." The borrower replies, "I will give a bill of sale ; but as the act allows you twenty-one days for registering it, do not register it until it is necessary." Then as to the second bill of sale, it appears to me to have been given under a new arrangement. The bills were dishonored. The appellant had to advance money to take them up ; new bills were then given him, and a new bill of sale. The case is not hit by the Bills of Sale Act, and certainly there is nothing to impeach the transaction as otherwise fraudulent.

SIR G. MELLISH, L.J. : I am of the same opinion.

Solicitors : Messrs. *Roscoe, Hincks, & Sheppard* ; Mr. *L. Barnett*.

⁽¹⁾ 5 B. & Ad., 674.

⁽²⁾ 4 My. & Cr., 690.

⁽³⁾ 10 W. R., 619.

⁽⁴⁾ Law Rep., 7 Ch., 20.

⁽⁵⁾ Ibid., 636.

⁽⁶⁾ 2 De G. & J., 222.

[Law Reports, 8 Chancery Appeals, 56]

L.C. Nov. 5, 1872.

*KIMBER v. BARBER.

[56]

[1870 K. 87.]

Agent—Purchase—Re-sale—Decree for Repayment.

A. being aware that B. wished to obtain shares in a certain company, represented to B. that he, A., could procure a certain number of shares at £3 a share. B. agreed to purchase at that price, and the shares were thereupon transferred, in part to him and in part to his nominees, and he paid to A. £3 a share. He afterwards discovered that A. was in fact the owner of the shares, having just bought them for £2 a share:

Held, that, on the facts, A. was an agent for B.: and A. ordered to pay back to B. the difference between the prices of the shares.

Decree of the master of the rolls reversed.

In the year 1850 a company, called the Colonization Assurance Corporation, was formed, but it appeared to have fallen into abeyance. Early in January, 1870, Kimber, Barber, and others, desired to reorganise the company, and to appoint new directors. Before new directors were appointed it was necessary to acquire a large number of shares, in order to qualify the new directors. The defendant Barber knew that Kimber was anxious to acquire shares for this purpose, and on the 19th of January, 1870, called upon him, and told him that he, Barber, knew of 264 shares for sale at £3. Barber was thereupon authorized by Kimber to buy the shares at £3. The shares were accordingly bought; sixty-four of them were transferred to Kimber, and 200 to his nominees, one T. G. Taylor, a broker, being the transferer, and Kimber paying Barber £795 for the shares and the transfer duty.

Kimber, as he alleged, subsequently learned that the shares had been in fact bought by Barber from one T. Jones at £2 a share, with a view to the sale to Kimber, and had been transferred by Jones to Taylor under the direction of Barber. Kimber thereupon filed the bill in this suit against Barber and a Mrs. Rutt, for whom Barber alleged he had bought the shares, charging that the 264 shares were purchased from Jones by Barber, as agent for the plaintiff, and praying for a declaration that the plaintiff was entitled to the benefit of the purchase of the 264 shares from Jones, and that the defendants, or one of them, might be decreed to pay to the plaintiff the sum of £264, being the difference between the parties *paid; or other- [57 wise, that the sale of the shares might be set aside, and that the defendant Rutt might be decreed to repay to the plaintiff, the sum of 795*l.* paid by the plaintiff, he offering to re-transfer the shares to the defendant Rutt.

It appeared, on the evidence, that Barber wrote on the 13th of January to Jones, asking, as for a friend, whether he would sell his shares, and on the 17th of January Barber concluded an agreement with Jones and forwarded him a blank transfer. After the interview of the 19th of January, Barber instructed Taylor to prepare bought and sold notes to the effect that the shares had been bought through Taylor as the broker, and the shares were afterwards transferred by Jones to Taylor. As Barber had not sufficient money to pay for all the shares, some of them were lent to him by Taylor, for the purpose of being transferred to Kimber. There was much other evidence in the case, which, for the purpose of this report, is immaterial.

Kimber had transferred ten of the sixty-four shares to other persons, so that at the time when the bill was filed he held only fifty-four shares.

The master of the rolls dismissed the bill without costs, holding, that no relief could be given to the plaintiff, as he had transferred 210 out of the 264 shares, and had thus rendered it impossible to set aside the transaction (¹).

(¹) 1872. April 18.

LORD ROMILLY, M.R., after stating the facts of the case, and reading the prayer of the bill, continued :

I think that the first part of the relief prayed is not within my power to give. It would, in fact, be making a new contract for the parties, which I have no right to do. They were the defendant's shares which he sold for £3, and I have no right to compel him to sell them for £3, or for any other price than the price he stated. But at the same time it is quite clear that he ought not to be allowed to gain any advantage by the concealment from the plaintiff of the real facts of the case, and of his interest in the shares. The proper relief, therefore, would be that which is prayed for in the second branch of the prayer ; and if the matter stood between the parties exactly as at first, I should have had no hesitation in granting it. I am of opinion that the conduct of the defendant in concealing the real facts, and in endeavoring to complicate the matter by the introduction of Mrs Rutt and of the stock-broker, Mr. Taylor, are such as to entitle the plaintiff to ask that the whole transaction should be set aside, and the shares restored to the defendant Barber, and the money repaid by him to the plaintiff, if that be possible. But now arises this difficulty : the plaintiff is not in a situation to

restore the shares, for he has parted with a great portion of them, and has retained only fifty-four of them for himself, the rest having been transferred to persons, no one of whom is a party to this suit. The consequence is that the plaintiff has precluded himself from obtaining the relief prayed for in the second branch of the prayer of the bill.

The view that I take of this case is fully represented in the case of *Great Luxembourg Railway Company v. Magnay* (25 Beav. 585), which came before me in 1858. In that case the defendant, Sir William Magnay, having been supplied by the Luxembourg Railway Company with a large sum of money to buy a concession made by the Belgian government, it turned out that he was himself the owner of that concession, and that he sold it to the company for his own benefit as the vendor. I held that the transaction could not stand, and that the only proper relief would be to annul the whole transaction, and to order the concession to be returned and the purchase money to be repaid. But pending the suit, the Luxembourg Railway Company had themselves sold this concession to another person, and had thereby adopted the transaction, assuming and acting on its validity : and consequently I held that, having done so, they were no longer in a position to restore the de-

*The plaintiff appealed.

[58

Mr. ~~By~~ Q.C., and Mr. Woodroffe, for the plaintiff.

Mr. Shebbeare (Sir R. Baggallay, Q.C., with him) for the defendants, contended, on the facts, that the defendant Barber was not an agent for the plaintiff; and that if he was agent, he was so gratuitously, and not bound to the plaintiff. The plaintiff knew all about the company and the price of the shares, and could not complain of having been deceived in the price.

LORD SELBORNE, L.C. : I am sorry to say that I cannot quite agree with the master of the rolls in this case, although it appears to me that in substance his lordship took exactly the same view of the facts, or, at all events very nearly the same view of the facts, as I do.

*[His lordship then stated that he agreed with the master [59 of the rolls in thinking the whole case as to Mrs. Rutt fictitious. His lordship believed the statements of the plaintiff, and held it to be established that there was as to these shares a fiduciary relation between him and Barber. Barber knowing the wish of the plaintiff to get some shares, wrote to Jones, applying as for some one else. Barber's case was that this application was for Mrs. Rutt, but his lordship agreed with the master of the rolls that that case had failed. His lordship commented further on the evidence as showing that Barber was throughout the agent of the plaintiff, and had not even been able to pay for the shares until he got the plaintiff's money.]

To my mind, with the greatest deference to the master of the rolls, if his lordship thought otherwise, this is a very clearly established case of agency. That being so, I see no difficulty in the relief which is asked by the first part of the prayer. It seems to me the common relief, the relief which was given in *Hichens v. Congreve* ⁽¹⁾, *Bank of London v. Tyrrell* ⁽²⁾, and in other cases too numerous to mention.

It is unnecessary to inquire, therefore, whether, if I had been obliged to consider the alternative part of the prayer, I should

findant to the position in which he was before the suit was instituted; and thereupon I dismissed the bill in that case, but without costs. I take the same view of this case, and adopt the observations I made in that case.

I am of opinion that the only proper relief is to restore the shares and repay the money; but the plaintiff has rendered this impossible. I have no control over the holders of the other shares, and do not even know, if they were parties, whether they would, without exception, consent to restore the shares

transferred to them. Most certainly I could not compel them so to do, and no decree of mine could touch the holders of these 210 shares, between whom and the defendant there is not any privity.

The plaintiff has therefore precluded himself from obtaining the relief prayed for; but as the suit was occasioned by what I consider to have been the misconduct of the defendant Barber, the bill must be dismissed without costs.

⁽¹⁾ 4 Russ., 562, 577.

⁽²⁾ 10 H. L. C., 26.

have been pressed with the difficulties which weighed upon the mind of the master of the rolls. I will not go into that farther than to say that, as it appears to me, the case of *Great Luxembourg Railway Company v. Magnay* (¹) is, assuming it to be well decided, a case in its circumstances very different from the present case. On the view which I take of the facts in this case, there is no difficulty in granting the relief sought by the first portion of the prayer.

I am obliged, therefore, to reverse the decree made by the master of the rolls, and to substitute a decree in the terms of the first part of the prayer of the bill, for the payment by the defendant Barber of the sum in question, and that he also pay the costs of the suit.

Solicitors for the plaintiff: Messrs. *Kimber & Ellis*.

Solicitor for the defendants: Mr. *A. T. Hewitt*.

[Law Reports, 8 Chancery Appeals, 60].

L.C. Nov. 6, 1872.

60]

**Ex parte* BAILEY.

Patent — Rival Applicants — Priority — Delay — Date of Patent.

An applicant for a patent two months after the date of his provisional protection applied for the great seal to be affixed. A week afterwards a caveat was entered, but the applicant did not, until six months from his original application had nearly elapsed, present a petition for the great seal:

Held, that his delay was not an objection to the sealing of his patent

B. applied for a patent, and obtained provisional protection on the 30th of March, C. on the 3d of April. B. applied for the great seal on the 21st of May; C. obtained letters patent on the 23d of May, antedated, according to the usual practice, to the 3d of April. The patents appearing to be partially for the same matter:

Held, that, whether the conduct of C. had or had not been fraudulent, the letters patent granted to B. must bear date on the 21st of May, and not on the 30th of March.

W. H. BAILEY, on the 30th of March, 1872, applied in due form for letters patent for an invention of a pyrometer, and obtained provisional protection. On the 3d of April J. L. Cassartelli applied for letters patent for an invention of a pyrometer, and obtained provisional protection. On the 23d of April Bailey gave notice of his intention to proceed, and on the 21st of May he applied for the great seal to be affixed to letters patent for his invention. On the 22d of May the great seal was affixed to letters patent for Cassartelli's invention, which were dated the

(¹) 25 Beav. 586; 4 Jur. (N.S.), 889.

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Ex parte Bailey.

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3d of April, 1872; and on the 29th of May Cassartelli entered a caveat objecting to the sealing of Bailey's letters patent, upon the ground that his invention was wholly or in part the same as Cassartelli's.

On the 27th of September Bailey presented a petition, alleging that Cassartelli had improperly endeavored to obtain priority, and had, besides, improperly made use of information as to experiments made by Bailey, and had obtained letters patent by fraud; and praying that the great seal might be affixed to letters patent for Bailey's invention, to bear date the 30th of March, 1872, when his first application was made, or that the time for sealing his letters patent might be extended. Evidence [61] was entered into in support of the allegations in the petition.

The petition now came on to be heard.

Mr. Aston, Q.C., and Mr. Kekewich, for the petitioner, proceeded to argue that the conduct of Cassartelli had been fraudulent.

The lord chancellor said that he should decide as was decided in *Ex parte Bates & Redgate* ⁽¹⁾, that even if the conduct of Cassartelli had been as alleged, Bailey's patent could not on that ground be antedated.

Mr. Aston and Mr. Kekewich then proceeded to argue that the inventions were different, and that in this case the existence of one patent was not an objection to the granting of other letters patent.

Mr. Fry, Q.C., and Mr. North, for Cassartelli: Even if an inquiry was directed, and it was found that any part of Bailey's invention was not covered by the other patent, still the date of his patent must be that of his application for the great seal. Bailey applied on the 21st of May for the great seal to be affixed, the caveat was entered on the 29th of May, and Bailey could then have presented his petition; but instead of doing so, he has waited till the middle of the long vacation, knowing that before the petition was heard our specification would be published, and he would have the opportunity of seeing it. He is now too late, and his patent ought not to be sealed. Cassartelli exercised only due diligence: *Lee v. Walker* ⁽²⁾. Bailey says that the inventions are dissimilar, and if so, it cannot signify what is the date of his patent.

Mr. Aston, in reply: Unless the identity is admitted, *Ex parte Bates & Redgate* does not apply. Unfortunately, in these cases one side does not know what is the invention on the other side, and is quite in the dark until the complete specification is filed.

*LORD SELBORNE, L.C.: In dealing with this case I shall [62]

⁽¹⁾ Law Rep., 4 Ch., 577.

⁽²⁾ Law Rep. 7 C. P., 131.

certainly not in any way whatever assume fraud on the one side or any improper motive on the other side for such delay or other course of conduct as may have taken place. The case must be decided on grounds quite independent of any such views.

First of all, it has been suggested, but I think not very confidently, by Mr. Fry and Mr. North, that it is no longer in my power to seal this patent. I say I do not think the suggestion was made very confidently, because the same learned counsel appeared to concede that if the patent were dated on the 21st of May last they would be satisfied. But if the argument which is addressed to me were valid, I hardly see how I could have any power to seal the letters patent at all.

As I understand the 20th clause of 15 & 16 Vict. c. 83, an applicant has ordinarily the whole six months of protection in which he may apply to have his letters patent sealed. Consequently Bailey, the present applicant, would not, as I read the clause, have been in default if he had deferred his application for sealing until the month of September, 1872, whereas some time before the six months had elapsed he presented his petition to the lord chancellor that the sealing might be proceeded with. Then is he, under this clause in the act, put in a worse position because he has given his notice to seal some months before he was obliged to do so? I think not. I think he was quite entitled to take the first step on any day within the time which the statute allowed him. For the second step, I am certainly not going to decide that if the application to seal had been made in due time, and then a caveat had been presented, and then the applicant had allowed his provisional protection to run out, and had waited for an indefinite time without any explanation, he would afterward be permitted to say that the caveat prevented him from getting the patent sealed. I am not going to say, on the other hand, what would be proper to be done, or that under no conceivable circumstances the caveat would be admissible as a cause of delay. I am not going to pronounce any opinion on such a case, and I merely say that it would require consideration whether the act of parliament would or would not be fatal to the application.

63] *But in this case the petition to the lord chancellor was presented within the six months, and it was presented in the long vacation. The application now comes on for decision, and that objection appears to me wholly to fail.

That brings me to the next important question, and that is, whether, assuming there to be here matter justifying the application for the sealing of the patent, that patent should be dated as in the usual manner, with the date of the original application, or according to the principle laid down in *Ex parte Bates & Red-*

gate⁽¹⁾, with the date of the application for sealing, that is, the 21st of May, 1872. Now, Bailey has sworn that some object will be accomplished by his invention which will not be accomplished by the invention of Cassartelli, of which the complete specification is on the file; and no answer has been made to that statement. It must, therefore, be taken that Cassartelli is not able to assert, or at all events has not proved, that the invention for which he has obtained a patent comprehends those particular improvements and matters which are sworn to on Bailey's part as distinctions in his invention. I take that as enough for the present purpose to show that Bailey's invention comprehends some matters not in the invention of Cassartelli, and that those may be useful and important, and proper subjects of a patent. I therefore think that Bailey is entitled to have a patent for those things.

But the question is, whether, being entitled to have a patent for those things which he has shown to be distinctions between his own invention and the invention of Cassartelli, he is therefore entitled to have a patent which shall override retroactively the patent which Cassartelli has obtained, and shall thus enable him to file a specification comprehending matter which is in Cassartelli's patent, thereby putting Cassartelli to the proof of earlier invention as against the *prima facie* evidence of a patent of earlier date.

The crown cannot with knowledge grant a second patent in derogation of a former grant; nor can I, without *scire facias*, at once assume that the first patent is void. That is what I understand to be decided in *Ex parte Batcs & Redgate*, a decision which I shall certainly follow, even if it produced a novelty in the practice, as Mr. Justice Grove, a very great authority on the subject, appears to *have thought: *Lee v. Walker*⁽²⁾. That [64 seems to be the principle of the decision, and I do not see any sound answer in law to that principle. But however that may be, the case was so decided, and has been followed, and I do not intend to depart from it. The rule laid down in that case, as I understand it, so far as it applies to a case like the present, is, that if an application to seal a patent is made after the sealing of another, and the second patent appears to comprehend some things not comprehended in the patent already sealed, then for those things the new patent ought to be granted. Care must, however, be taken that the new patent does not cover the ground which is covered by the earlier patent. I do not mean that the court is to surmise such to be the case, but where the facts of the case give reasonable ground to apprehend that it may be so, then I understand the authority of *Ex parte Batcs & Redgate*⁽¹⁾

(1) Law Rep. 4 Ch., 577.

(2) Law Rep. 7 C. P., 121.

1872

Waite v. Littlewood.

L.C.

to mean that in order to prevent the possibility of doing one thing when another thing is intended, care shall be taken so to date the patent that it shall not operate on the subject matter of the patent previously granted.

Now, so far from finding in this case any evidence whatever, even on Bailey's part, that if the patent were made to override in point of date the patent of Cassartelli, it would not include any matter comprehended in Cassartelli's patent, I am, from a perusal of the petition and from a perusal of Bailey's own affidavit and the affidavits in support of his claim, compelled to come to the conclusion that it would probably do so, and that his very object in desiring to have the earlier rather than the later date is to give him, in the possible case of a contest between himself and Cassartelli as to the validity of Cassartelli's patent, the advantage of a patent in some respects covering the same matter and bearing the earlier date. I hold, therefore, that Bailey is entitled to have his patent sealed, but that I am bound by the principle and by the rule in *Ex parte Bates & Redgate* to decide, and I do decide, that the patent granted to Bailey shall bear date the 21st of May, 1872, when he applied for the great seal to be affixed.

Solicitors for Mr. Bailey : Messrs. Gregory, Rowcliffes, & Rawle.
Solicitor for Mr. Cassartelli : Mr. W. W. Wynne.

[Law Reports, 8 Chancery Appeals, 70.]

L.C. Nov. 19, 20, 1872.

70]

*WAITE V. LITTLEWOOD.

[1872 W. 78.]

Will — Construction — Survivor — Other.

A testator gave a sum of money in sixths, and directed his trustees to hold one sixth in trust for each of his six daughters for life, with remainder to her children, to be transferred and vested at twenty-one or marriage; and he provided that in case any of his daughters should die without leaving a child, then her share should go in trust for his surviving daughters in equal shares, if more than one, during their respective lives, and after their decease for their respective children *per stirpes* and not *per capita*, in the same manner as the original shares :

Held, that on the death of a daughter without leaving a child who attained 71] *twenty-one or married, the children of other daughters, who had predeceased her took shares in her one-sixth.

The principles upon which the court considers the word "survivor" as not completely expressing the testator's intention, discussed.

Decision of the master of the rolls reversed.

THIS was a special case stated for the opinion of the court upon the construction of the will of John Waite.

John Waite, who died in 1820, by his will bequeathed to trustees the sum of £23,333 6s. 8d. consols, upon trust as to one-sixth part thereof to apply the dividends for the maintenance of the testator's daughter Jane until she should attain the age of twenty-one years or be married, and afterwards to pay the dividends to the separate use of Jane Waite; and after her decease upon trust to transfer the same sixth part unto her children as she should appoint, and in default of appointment, then unto her child or children; the shares of a son or sons to be transferred to him or them respectively at the age of twenty-one years, and the shares of a daughter or daughters to be transferred to her or them at her or their like age or respective days of marriage; their respective interests to become vested on their respectively attaining the age of twenty-one or marrying, as aforesaid. The testator then gave directions for the maintenance of such children, and for the accumulation of the surplus income.

The will contained a similar provision for each of the five other daughters of the testator, and contained the following clause: "Provided always, and my will and mind further is, that in case any of my said daughters shall happen to die without leaving a child, who being a son shall live to attain the age of twenty-one years, or being a daughter to attain that age or be previously married, then and in every such case the part or share, parts or shares, of such of my said daughters as shall so die and of whom there shall be such failure of children as aforesaid, shall, after her or their decease or respective deceases, and such failure of children as aforesaid, go and be in trust for my surviving daughters in equal shares, if more than one, during their respective lives for their separate use and benefit respectively; and after their respective deceases for their respective children *per stirpes* and not *per capita*, in the same shares and at the same times, and with and subject to *the same powers [72 of appointment and provisions for maintenance and advancement, and in the same manner in all respects and to all intents and purposes as hereinbefore declared or expressed of and concerning the said original shares intended for them respectively; and such benefit of survivorship shall extend as well to the share or shares accruing by virtue of this clause or direction as to the said original share and shares respectively."

The will next contained a gift over of the said sum of consols in case none of the testator's daughters should have a child, who being a son should live to attain the age of twenty-one years, or being a daughter to attain that age or be previously married.

The will contained a general residuary bequest, and contained bequests and directions in which the words "survivors or others" were used.

All the six daughters attained the age of twenty-one years.

Rosanna Derby Waite, one of the daughters, married the Rev. H. C. Radclyffe, and died in 1866, without having made any appointment under her power, and leaving one child only, who died in 1871 unmarried and under the age of twenty-one years. At the time of the death of Mrs. Radclyffe two of her five sisters were dead, each leaving children who had attained the age of twenty-one years. The question for decision in this case was, whether the one-sixth of Mrs. Radclyffe was to be divided between her sisters who were living for their lives with remainder to their children, or between them and the children of the two sisters who were dead.

The master of the rolls was of opinion that by the direction in the will that the surviving daughters should take during their lives only, the testator showed an intention that only living daughters and their children would take shares.

The children of the deceased daughters appealed.

Mr. Southgate, Q.C., and Mr. Millar, for the appellants: It is clear on the authorities that "survivor" must here be read "other:" *Wilmot v. Wilmot* ⁽¹⁾; *Badger v. Gregory* ⁽²⁾; *Hurry v. Morgan* ⁽³⁾.

*Sir R. Baggallay, Q.C., and Mr. Phillimore, for the respondents: In all these cases it is very probable that the testator would have provided differently for the events which happened if his attention had been drawn to the matter, but he has not, and we must take the will as we find it, and not construe it by conjecture: *Smith v. Osborne* ⁽⁴⁾. In none of the cases cited are the expressions the same as those used here, and there is no reason to construe "surviving" otherwise than in its literal sense.

Mr. Dauney, for the trustees.

LORD SELBORNE, L.C.: There can be nothing more certain than that every will is to be construed by itself, not with reference to other wills; and all the light that can be got from other decisions serves only to show in what manner the principles of reasonable construction have by judges of high authority been applied in cases more or less similar.

Now I do not know whether any of the cases which have been cited are very closely like the present, but the present case seems to me to have in its circumstances tending much more strongly than in most of those cases to the conclusion that the testator did not mean the gifts over to be dependent upon the accident of the survivorship of tenants for life whose children were to take after them. He seems to have meant that wherever

⁽¹⁾ 8 Ves., 10.

⁽²⁾ Law Rep., 8 Eq., 78.

⁽³⁾ Law Rep., 3 Eq., 152.

⁽⁴⁾ 6 H. L. C., 375.

there was a failure of a particular *stirps* the share of that *stirps* should accrue to the other *stirpes*, and go in the same manner as the original shares.

I do not entirely assent to language which is to be found pervading almost all the cases upon questions of this kind, that the question is whether the word "survivor" is to be read "other." I think there is certainly a very strong probability that any one using the word "survivor" does not precisely mean "other" by it, but has in his mind some idea of survivorship; and if the question is simply whether you are to turn it into "other," and say it is used merely by mistake for the word "other," which is the true word to express the testator's meaning, there is undoubtedly a strong *onus probandi* cast [74 upon any one who would do that violence to the literal meaning of the word. It would be a strange thing to hold that so many testators were in the habit of using the word "survivor" when they simply meant "other." Generally speaking, a reason of some kind will be found for the use of the word "survivor" where it occurs, though it may very possibly be, and often in these cases is, an imperfect expression, not expressing completely and exhaustively the whole intention. If no such explanation can be suggested, it is a strong argument against any construction that would reject the word in its proper and primary meaning altogether, and substitute a word which has a different meaning. His lordship then expressed his opinion that upon the whole scheme of the will it was very improbable that the grandchildren were to take only if there should happen to be tenants for life to precede them. It must also be considered that there was a just disposition of the court in doubtful cases to lean to that construction which made a complete provision for all those children or descendants who were manifestly the objects of the testator's bounty. Moreover, it was quite manifest that the last of the daughters dying might die without leaving a child, in which case the word "survivor" could not apply; and the children of more than one of them who might die leaving children might be living at the death of the last survivor of the daughters, and might afterwards die under age and unmarried. Therefore the argument which was thought conclusive in the case of *Smith v. Osborne* ⁽¹⁾ applied, though with rather less force, because in that case there were two children only. Still that construction must be preferred which gave effect to the bequests over in every case which might occur. No one could read the sentence in question as a whole and not see plainly and distinctly that the general intention of the testator was to keep the property together, and continually to subdivide the accruing

(1) 6 H. L. C., 375.

shares between the same persons remaining who were to take the original shares, and to refer to the gifts of the original shares as the scheme which was to govern the devolution of the accruing shares.

Nor was there any serious difficulty arising from the introduction of the words "my surviving daughters." The difficulty, instead of being increased, was very much diminished by the addition of the words "during their respective lives for their separate use and benefit respectively," because of course a tenant for life could not possibly take in possession unless he was living. This made the case very much like *Key v. Key* ⁽¹⁾. In that case a reasonable construction prevailed, and here also the reasonable construction was, that there were to be tenants for life in the cases in which there were surviving daughters to take for life; if not, then the remainders to their children were to take effect. This construction was strengthened by that circumstance which has frequently been held conclusive, that the whole was to go over in case none of his said daughters should have a child who should fulfill the specified conditions. It could not go over if there had been a child of any daughter who fulfilled the conditions.

The fact of there being a residuary gift can make no difference. The words "in equal shares if more than one" seemed to create a difficulty, but that was cleared away by considering that there was an uncertainty as to the number of the daughters from whom the *stirpes* were to spring, as the daughters seemed all to have been minors when the will was made, and until they attained the age of twenty-one, or were married, they were to be maintained, at the discretion of trustees, out of the income; the surplus being directed to accumulate in augmentation of the capital, and the shares of the capital being given only on the attainment of majority or marriage to each daughter. So that when the testator made his will it was possible that any given number of his daughters might have died in minority and unmarried, and then the trusts for the daughters as tenants for life, with remainders over, as to any particular daughter, might not have arisen, and this by itself seemed quite enough to account, if explanation were necessary, for the introduction of those words of contingency, "if more than one."

His lordship was unable to come to the conclusion in this case at which the master of the rolls arrived, and made a declaration that the share of the deceased daughter was divisible in fifths between the surviving daughters for life, with remainders to their children, and the children of the two daughters who had died leaving issue.

Solicitors: Messrs. *Walters, Young, & Co.*; Mr. *Murray*.

⁽¹⁾ 4 D. M. & G., 78.

[Law Reports, 8 Chancery Appeals, 76.]

L.C. Nov. 28, 25, 1872

*ADDISON v. COX.

[76]

[1871 A. 7.]

Sale of Commission — Mortgagee — Notice — Priority — Costs of Appeal.

An officer in a regiment assigned the money to arise from the sale of his commission to two assignees separately. He obtained leave to sell out, and the two assignees gave to the agents of the regiment simultaneous notices of their incumbrances. £450, forming part of the money which the officer would receive, came from a particular fund in the hands of the agents, held by them subject to the directions of the Horse Guards. Six days after the notices had been given, a letter was sent from the Horse Guards — the purport of which was communicated by the agents to the officer — requesting the agents to transfer £450 from the fund to the officer. The first assignee then gave a second notice. The agents sent a form of receipt to the officer, which was returned by him signed, before which the £450 was not issuable by the agents. The second assignee then gave a second notice:

Held (reversing the decision of the master of the rolls), that the first assignee had priority over the second assignee.

Where a mortgagee appeals from the decision of a court below, and the decision is reversed, he will be allowed to add his costs of the appeal to his mortgage charge.

By an indenture dated the 27th of October, 1869, Reginald Pretor, then a lieutenant in the 40th regiment, mortgaged to the plaintiff Addison, by way of security for the repayment of £400 and interest, all the moneys to arise from the sale of his commission, or such moneys as might come into the hands of the agents of the regiment and be placed to his account with them.

By an indenture, dated the 1st of January, 1870, Lieutenant Pretor assigned to the defendant Mountain, by way of security for the repayment of £700 and interest, all the moneys that should become payable on the sale of his commission.

The full regulation price of a lieutenancy in the 40th regiment was £700, whereof £250 was payable by the ensign promoted and £450 was payable by the gentleman appointed to the ensigncy vacated; or when the ensigncy was absorbed instead of being filled up, then out of a fund called the reserve fund, kept by Messrs. Cox & Co. who were the regular agents of the regiment, and acted under the direction of the military authorities at the Horse Guards.

*On the 30th of September, 1870, Lieutenant Pretor [77 was permitted to retire from the army by the sale of his commission, and his retirement was gazetted on the 1st of October.

Messrs. Cox & Co., had then in their hands the sum of £250, paid in by the ensign to be promoted, and carried by them to

an account kept by them under the direction of the military authorities, and called the "sales of commissions account," but it did not become their duty to issue to Lieutenant Pretor the £250 until the 1st of October, 1870.

In the morning of the 1st of October, 1870, Messrs. Cox & Co. received from Addison, from Mountain, and from other incumbrancers, simultaneous notices of incumbrances on the proceeds of the sale of Lieutenant Pretor's commission.

On the 6th of October, 1870, Cox & Co. received a formal letter from the Horse Guards, requesting them to transfer £450 from the reserve fund to Lieutenant Pretor. Previously to the receipt of this letter they had no authority in regard to that sum; and under the regulations of the Horse Guards they were not authorized to issue out of the reserve fund any sum to any officer or to any person claiming under him, except upon a written receipt for the amount signed by him; and such receipt was the only voucher accepted by the war office for such payment.

On the same 6th of October Cox & Co. sent to Lieutenant Pretor a form of receipt for the £450.

On the 14th of October Addison gave to Cox & Co. a second notice of his charge.

On the 20th of October the receipt was returned to Cox & Co. signed by Lieutenant Pretor; and thereupon, and not before that time, the £450 became issuable by Cox & Co.

On the 4th of November Cox & Co. received from Mountain a second notice as to his charge, and on the 24th of January, 1871, they received from Addison a third notice as to his charge.

After some correspondence Addison filed the bill in this suit against Cox & Co., Mountain, and the other incumbrancers, praying that the proceeds of the sale of the commission now in the hands of Cox & Co. might be applied in payment to the plaintiff of the principal and interest due to him, and of his costs.

Mountain claimed priority over the plaintiff as to the £450, 78] but *admitted that, as to the balance of the £250 (after deducting Cox & Co.'s charges), the plaintiff's security being prior in date and the notices being simultaneous, the plaintiff's claim must prevail.

The facts of the case and the manner in which Messrs. Cox & Co. held and were bound to deal with the fund in question, as above stated, appeared from their answer.

The master of the rolls thought that the £450 was not held in trust for Lieutenant Pretor or his assigns until the receipt for it came into the possession of Messrs. Cox & Co., before which time it was, as they stated, not issuable to him. And his lord-

ship held that the claim of Mountain must therefore be allowed, and made a decree accordingly.

The plaintiff appealed.

Mr. *Fry*, Q.C., and Mr. *Bradford*, for the plaintiff: The question is, whether, when our notice was given, the relation of trustee and *cestui que trust* existed, and we say that it existed as soon as the letter appropriating the money was received, and as our notice of the 14th of October came first after that, our claim must have priority. The cases on the subject are *Buller v. Plunkett* ⁽¹⁾; *Webster v. Webster* ⁽²⁾; *Somerset v. Cox* ⁽³⁾.

Mr. *Chitty*, for Cox & Co.

Mr. *Ince*, for the defendant Mountain: A similar case was before the master of the rolls in *Yates v. Cox* ⁽⁴⁾. The money did not pass to Lieutenant Pretor's account until certain formalities had been gone through. Until he gave the receipt Cox & Co., would not part with the money, as that was the only voucher they would have. There was in this case a condition precedent to be performed, and nothing passed until that was done. Our notice of the 4th of November was the first after the receipt had been given, and the money was really payable, and that notice gives us priority.

Mr. *Fry*, in reply.

*LORD SELBORNE, L.C: I must say that I am unable to [79 reconcile the judgment which has been given in this case with the broad and plain principles of the law of equitable assignment as understood in this court.

There is no question as to the sufficiency of the assignment as between the assignor and assignee. It is a mere question of competition between two assignees, one prior and one subsequent in date, depending of course upon the question whether the first assignee did all which he ought to have done, and which it was in his power to do, to complete his assignment by notice.

I think that on the broad principles of the law of equitable assignment, it ought to be enough priority, enough to complete the equitable assignment of a chose in action, if notice be given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable or is merely charged with the duty of making the payment. Nor, in my judgment, is it material whether the right to receive the money and the consequent obligation to pay it is, at the time when the notice is given, absolute or conditional, so long as the person who receives the notice is himself bound by some contract or

⁽¹⁾ 1 J. & H., 441.

⁽²⁾ 81 Beav., 393.

⁽³⁾ 88 Beav., 634.

⁽⁴⁾ 17 W. R., 20.

obligation, existing at the time when the notice reaches him, to receive and to pay over, or to pay over, if he has previously received, the fund out of which the debt is to be satisfied.

The cases which Mr. Ince cited as to the sale of commissions, all, when they come to be examined, turned, upon the fact that the notice was given to a mere possible agent before he was an actual agent, before the time at which he was in any sense liable to make payment, neither being himself a debtor, nor at that time charged with the duty of paying the money in question. If the present case were similar, I should certainly, not only because the authorities would bind me, but because I should entirely assent to their principles, follow those decisions; but the present case appears to me to be wholly unlike them.

In the first place, I must consider what was the position of the assignor, and what was the subject of the assignment when it was made. It is, I apprehend, clear upon the evidence before the court that the assignor was, at the time when the assignment was completed by notice, a creditor of the crown. [His 80] lordship *then read from the answer of Cox & Co., the circumstances, as stated above.] The result is simply this: by the crown regulations in force at that time, the lieutenant whose retirement was permitted by the crown had a right to receive the regulation price from the purchaser of his commission; and if the crown thought fit to absorb, as it is called, the lowest commission, the crown became itself the purchaser of the absorbed commission. Accordingly, as soon as the election of the crown to absorb the ensigncy commission was declared, £450 became actually payable as a debt by the crown to the officer whose retirement had been accepted. But how was this debt payable? and were Cox & Co. strangers to the duty of paying this debt? On this question again their answer is conclusive. They say they were under a positive obligation to act according to the directions of the military authorities at the Horse Guards and war office, and that when the commission is absorbed, then the price is payable out of a fund kept by them under the direction of the military authorities, and called the reserve fund. So that it appears to me very difficult satisfactorily to distinguish this case from the case of *Row v. Dawson* (¹), decided by Lord Hardwicke, even if the letter had never been written, and if the matter rested simply upon this; that by the acceptance of the retirement of the officer, and by the election to absorb the ensign's commission, £450 actually became payable out of a fund kept by Cox & Co. under the direction of the military authorities, and called the reserve fund.

On what principle could it be said that notice to the persons

(¹) Ves. Sen., 331.

who had in their hands the fund, out of which the absolute debt due from the crown to this gentleman had become payable, would not be sufficient? The case of *Row v. Dawson* seems to me quite inconsistent with such a supposition. [His lordship then stated the facts of that case, and read portions of the judgment of Lord Hardwicke.]

So the matter would have stood, as it seems to me, merely upon the course of the office, and upon the statement of Cox & Co., that, where the crown absorbed a commission, the regulation price for the commission absorbed was payable out of a fund kept by them under the direction of the military authorities.

*But the case does not rest at that stage. It goes much [8] further; for Cox & Co. say that, "The said sum of £450, which by reason of the aforesaid absorption of the said ensigncy, became payable out of the said reserve fund, did not become issuable before the 26th of October." But money which is absolutely due and payable out of a particular fund may be only issuable upon compliance with certain regulations, which do not affect the right to the debt, but the right to the payment. And here there is no answer whatever, as it seems to me, to the remark so justly made by Mr. Fry, in reply, that the argument on the other side goes the full length necessarily of saying, that this crown debt due to the officer was not in equity assignable at all as long as it retained the character of a crown debt, unless indeed it had been contended, which it was not, that the assignee ought to have gone somewhere else, namely, to the secretary of state for war, or to the Horse Guards, to give his notice, which would, I apprehend, have exposed him to greater difficulties.

However, that was not distinctly argued; but the result of the argument must be, that this was not an assignment in equity such as to be capable of completion, inasmuch as the money was not to be regarded as payable until it was issuable, and was not issuable until a receipt for it had been given. But, on the very face of the evidence, the distinction between the time when it is payable and the time when it is issuable is plainly taken, and the requiring of a receipt before it is issuable means only that it will not be actually paid without a receipt.

What does "issuable" mean? It means to be paid over the counter; to be actually paid in cash, if it is claimed, or if any other arrangement is made which is equivalent to that, as far as the crown is concerned, as, for example, by the officer being content to have it carried to his credit with Cox & Co., which comes to the same thing. The meaning of the receipt is, that when the money is actually issued — in other words, when the

crown pays the debt through its agent — then a receipt is to be given, but in the meantime the debt is assignable like any other debt.

The sole question is whether, being assignable, Cox & Co. are the proper persons to receive the notice? But if it were necessary to go beyond that, we are carried further, because on 82] the *6th of October, 1870, the proper officer of the Horse Guards wrote to Cox & Co. (who have told us that “as such agents we act, and are bound to act, under the direction of the military authorities at the Horse Guards and war office,”) in these terms: [His lordship then read the letter.] Why that, if communicated — and it was immediately communicated, evidently in the ordinary and regular course of business, by Cox & Co. to Lieutenant Pretor — was a communication which, I must take it, was made from the commander-in-chief by the authority and as agent of the crown. It was in itself an equitable assignment by the crown to Lieutenant Pretor of a certain part of the reserved fund in the hands of Cox & Co. for the payment of this particular debt. Any one who will refer to what Lord Eldon says in *Ex parte South* ⁽¹⁾ will see that in equity, if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him; and Lord Eldon went on to say that, according to some decisions at law, unless the person who receives the order has entered into some contract, or enters into some promise upon it, an action cannot be maintained against him; but that is not the rule in a court of equity. In that particular case he also notices that what had passed between the parties — which, in my judgment, was not more than what passed in this case between Cox & Co., and Lieutenant Pretor — would be in itself sufficient to remove that difficulty, and show an assent in point of law and authority to make the payment.

The same doctrine was laid down by Lord Cottenham in *Burn v. Curvalho* ⁽²⁾, that “in equity an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund.”

The crown, therefore, when that order was written and communicated to Lieutenant Pretor, had actually made what this court considers a binding equitable assignment to Lieutenant Pretor of that portion of the reserve fund in Cox & Co.’s hands, which was requisite to pay the £450; and we have, as it seems to me, everything necessary to make Cox & Co., from that time forth at all events, stakeholders of the agreed and appropriated 83] *fund for Lieutenant Pretor’s payment. If that be so

⁽¹⁾ 3 Sw., 392.

⁽²⁾ 4 My. & Cr., 690-702.

there is an end of the case, because the notice was promptly given after that date, and was given first by the present plaintiff. I feel it, therefore, my duty to vary the order under appeal, and to make a decree in the appellant's favor, giving him the first charge, and he will add to his charge the costs of this appeal.

Mr. *Ince*, for Mountain, objected that this would in fact be making the respondent (contrary to the settled rule) pay the costs of the appeal as his security was insufficient.

HIS LORDSHIP said that he did not consider that rule to apply so as to deprive the holder of a security of his right to add his costs to his security.

Solicitor for the plaintiff: Mr. *Peard*.

Solicitors for Cox & Co.: Messrs. *Fladgate, Clarke, & Co.*

Solicitors for the defendant Mountain: Messrs. *Edwards, Layton, & Juques*.

(Law Reports, 8 Chancery Appeals, 83).

L. C. Nov. 30, 1872.

ELLIS v. SILBER.

[1872 E. 32.]

Bankruptcy—Trustees—Jurisdiction—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 65, 66, 72, 130.

Where a suit would, but for the fact of a bankruptcy, be fit to be entertained by the Court of Chancery, the jurisdiction is not taken away by the Bankruptcy Act, 1869. Therefore when a trustee in bankruptcy has, in respect of the bankrupt's estate, a claim against a third person, that claim may be prosecuted at law or in equity, and is not subject to the jurisdiction of the Court of Bankruptcy.

Decision of the master of the rolls reversed.

Ex parte Anderson (1) distinguished.

THE bill in this case was filed by the trustees of the inspectorship deed of George Cannock against A. M. Silber and N. H. Fleming, late partners of Cannock; and contained allegations that, at the time when the deed of dissolution of the partnership between them was executed, Cannock was in such a state of nervousness and alarm as not to be accountable for his [84] actions; and that the deed contained false recitals. The bill contained charges that the deed of dissolution was void on the various grounds stated, and also because it was not competent for Cannock, in his then state of insolvency, to execute any deed which would prejudice the rights of his creditors over his estate. The bill also stated the provisions of a deed of inspectorship, dated the 23d of December, 1869, by which Cannock, Tait, and

(1) Law Rep., 5 Ch., 473.

others who were his partners in another business empowered the trustees of the deed to get in their estate and apply it to the payment of their creditors; and it was declared that the deed should operate as a deed of inspectorship within the meaning of the 192d section of the Bankruptcy Act, 1861. And the bill stated that this deed was duly assented to and registered in the Court of Bankruptcy on the 31st of December, 1869, under the Bankruptcy Act, 1861, and the Bankruptcy Amendment Act, 1868. That by another deed, dated the 29th of August, 1870, Cannock, Tait, and their partners assigned all their estate to the trustees on the trusts of the deed of inspectorship. That by an order of the Court of Chancery under the Trustee Acts, other trustees of the inspectorship deed had been appointed. And the bill prayed a declaration that the deed of dissolution of the partnership between Cannock, Silber, and Fleming, was fraudulent and void; and that the defendants might be decreed to pay the plaintiffs, as trustees of the inspectorship deed, two sums of £3400 and £4702 in the bill mentioned, with interest, as due to Cannock on taking the accounts between him, Silber, and Fleming.

To this bill the defendants demurred for want of equity, and also because the matter was within the jurisdiction of the Court of Bankruptcy.

The master of the rolls, after stating the allegations in the bill, said that he was of opinion that upon the bill there was no case made for relief in equity, and that if this suit came before the court upon the facts stated, he could not make a decree in favor of the plaintiffs. His lordship had preferred to proceed upon the merits rather than upon the technical question whether the proper course for the plaintiffs was to proceed before the Court of Bankruptcy; and his lordship allowed the demurrer. 85] *The plaintiffs appealed.

Mr. Fry, Q.C., and Mr. H. M. Jackson, for the appellants.

Sir R. Baggalley, Q.C., and Mr. W. W. Karslake, in support of the demurrer: The design of the legislature was that all such matters should be left to the Court of Bankruptcy, which has complete jurisdiction. Under sects. 129 and 130 of the act of 1869 (32 & 33 Vict. c. 71), and the bankruptcy rules, 1870, the trusts of this deed are to be administered according to the act of 1869, and the jurisdiction then belongs to the Court of Bankruptcy: *Ex parte Anderson* (1). The only restriction is in the 20th section of the Bankruptcy Repeal Act, 1869 (32 & 32 Vict. c. 83), and that does not apply. We also rely on sects. 65, 66, 72, and 96 of the act of 1869. Even under the act of 1861 such a matter would have been left to the Court of Bankruptcy:

(1) Law Rep., 5 Ch., 478.

Martin v. Powning ⁽¹⁾. No doubt this court may appoint a receiver, if necessary: *Riches v. Owen* ⁽²⁾; but it will not administer the estate.

Stone v. Thomas ⁽³⁾ and *Phillips v. Furber* ⁽⁴⁾ both show that where an estate is being administered in the Court of Bankruptcy all questions ought to be left to that court.

LORD SELBORNE, L.C.: Sir Richard Baggallay has argued — very carefully and fully argued — a point on which the master of the rolls in no degree whatever relied, that is, the second ground taken by the demurrer, that the jurisdiction to administer justice in this case between the parties is in the Court of Bankruptcy, and ought not to be exercised here. But Sir Richard Baggallay quoted no authority, as it appears to me, tending in the slightest degree whatever to support that proposition. The effect of the provisions in the several acts of parliament relating to bankruptcy is, that in these cases of arrangement deeds which have been registered in bankruptcy, the trustee for the purpose of administration under the deed has all the powers and all the rights in the Court of Bankruptcy which assignees or trustees under a regular bankruptcy would [86 have, and that for all the purposes of administration in bankruptcy the Court of Bankruptcy is armed with very large powers, both legal and equitable, — as large as may be necessary to do complete justice. But there was no case cited and no clause quoted from any act of parliament to the effect that whenever the trustee of a deed or the trustee or assignee in bankruptcy has a demand against a third person, which but for the bankruptcy would be proper to be prosecuted in a court of law or in a court of equity, the jurisdiction of the court of law or of the court of equity is as against that third person transferred to the Court of Bankruptcy. I apprehend that there is nothing whatever in the acts relating to bankruptcy which in an ordinary case not governed by the special clauses of the acts has any such effect.

That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the acts of parliament, may be specially dealt with as regards third parties. But the general proposition, that when-

⁽¹⁾ *Ibid.*, 4 Ch., 356.

⁽²⁾ *Law Rep.*, 8 Ch., 820.

⁽³⁾ *Ibid.*, 5 Ch., 219.

⁽⁴⁾ *Law Rep.*, 5 Ch., 746.

ever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the acts of parliament, and wholly unsupported by any trace or vestige whatever of authority.

It was admitted very frankly by Sir Richard Bagallay that the cases which he cited, with the exception of two of them, are as remote as possible from touching this question, being merely cases in which an attempt was made to transfer the proper administration from the Court of Bankruptcy into this court, the subject of the suit relating to the bankrupt's estate. One of them is *Ex parte Anderson* ⁽¹⁾, in which some pictures had been [87] transferred by the debtor to his nephew, but that nephew had come in and made certain arrangements as to those pictures with creditors of the bankrupt, and therefore the matter was *prima facie* brought by his own submission and his own acts under the administration in bankruptcy.

The other case, *Phillips v. Furber* ⁽²⁾, appears to me, when examined, to have, if possible, even less reference to the matter than the preceding, because there was really no question at all with Furber, the third party, who was merely a stakeholder having assets in his hands; and the suit, which was very properly dismissed in principle, though for the convenience of administration it was not dismissed in form, was merely a suit of competition between the trustees under one of these deeds prior in date and assignees under a later bankruptcy; and the question in the suit was whether the assets were to be administered under the deed or in bankruptcy. That was properly considered to be a question for the Bankruptcy Court to decide; so that there is no authority whatever in favor of the proposition that if, in other respects, this be a suit fit to be entertained by the Court of Chancery, the jurisdiction is taken away, or ought not to be exercised by reason of anything coming within the bankrupt laws.

[His lordship then stated and commented on the allegations in the bill, and came to the conclusion that as to the £4,702 no case was made by the bill; but that as to the £3,400, though the bill might be improved by amendment, he could not say that, if the suit came to a hearing and the allegations in the bill were proved, no relief would be given. The demurrer must, therefore, be overruled.]

Solicitors for the plaintiffs: Messrs. *Simpson & Cullingford*.
Solicitor for the defendants: Mr. *H. Skynner*.

⁽¹⁾ Law Rep., 5 Ch., 478.

⁽²⁾ Law Rep., 5 Ch., 746.

L.C. and L.JJ.

Lloyd v. Pughe.

1872

The question whether state courts have jurisdiction in suits by an assignee in bankruptcy is, in some cases, one of considerable nicety. Where the action is founded upon a *fraud upon the bankrupt act* it has been held in Michigan they have not. *Voorhies v. Friebie*, 12 Am. Law Reg., N. S., 108.

And in New York and Massachusetts that they have. *Gilbert v. Priest*, 63 Barb., 339; *Stevens v. Mechanics, etc.*,

101 Mass., 109. Mr. Bump thinks the better doctrine is that of New York and Massachusetts. Bump on Bankruptcy (5th ed.), pp. 185, 267.

Where the gist of the action is not a fraud upon the act there is no doubt they have. *Piper v. Harmer*, 8 Philadelphia Rep., 100; *Stevens v. Mechanics, etc.*, 101 Mass., 109; *Knowlton v. Moseley*, 105 Mass., 136, and see *Massey v. Allen*, 7 Bank. Reg., 401.

(Law Reports, 8 Chancery Appeals, 88.

L.C. and L.JJ. Dec. 17, 1872.)

LLOYD V. PUGHE.

[88

[1869 L. 3.]

Husband and Wife—Separate Estate—Chose in Action—Account at Bank.

A wife being executrix of her father paid money she received as such into a bank to an account in her own name as executrix. Her husband paid money of his own to this account, and the wife had drawn checks upon the account for payment of debts due by the husband and for payment of household expenses. The husband died:

Held, upon the facts of the case, that the wife was merely the agent of the husband, and that the money remaining in the bank belonged to his estate and not to the wife's

Decision of Malins, V. C., reversed.

MRS. LLOYD was the executrix and residuary legatee of her father, Mr. Hugh Jones. She had received various sums of money as such executrix, and had paid them into the North and South Wales Bank to the account of "Mrs. Elizabeth Lloyd, Llanwrst, sole executrix of the late Mr. Hugh Jones." The account was opened in May, 1862. It was continued in the same form after it ceased to be wanted, or used, for executorship purposes. It was in evidence that other sums were paid by her husband into the bank to the same account, and that checks were drawn by her for the payment of debts due by her husband, and for payment of tradesmen and other creditors on account of household expenses.

The husband died in July, 1868, when £374 was in the bank on this account; and the wife died in September of the same year.

Suits were instituted for the administration of the estates of both husband and wife, in the course of which suits the Vice-Chancellor Malins held that the husband intended this money

*Reversing 3 Eng. Rep., 715.

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to be the wife's, and that it formed part of her estate and not of her husband's estate; as reported ⁽¹⁾.

The creditors of the husband appealed.

Mr. Kay, Q.C., and Mr. Rigby, for the appellants, cited *Dummer v. Pitcher* ⁽²⁾.

89] *Mr. Cotton, Q.C., and Mr. Bradford, for the executor of the wife: This money was intended by the husband, who was then quite solvent, to be the wife's, and the bankers recognized her: *Dalton v. Midland Counties Railway Company* ⁽³⁾; *Gosling v. Gosling* ⁽⁴⁾. At all events this is a chose in action to which the wife had a legal right, and there is nothing to take it out of her. In *Hoyes v. Kinderley* ⁽⁵⁾ the wife died in the lifetime of the husband.

Mr. Kay, in reply, said that it was a clear case of agency, and cited *Philliskirk v. Pluckwell* ⁽⁶⁾; *Lucas v. Lucas* ⁽⁷⁾.

LORD SELBORNE, L.C., said that there were many cases in which a husband, or a stranger, had transferred property into the name of a married woman, or had placed it in the hands of a third party, upon a contract that it was to be for the benefit of the wife. His lordship would be sorry to suggest, without necessity, any doubt as to the validity of such transactions, whether intended to create a trust or to give a legal title. Of course no such title could be created in favor of the wife as against the true owner if he did not consent to the transaction. But if he did, his impression was, that there was nothing in the law to prevent the wife, if she survived the husband, from having the property.

It was, however, unnecessary, in the present case, to decide any such question, for this was an ordinary case of an agency account opened by a husband with bankers for the purpose of convenience, and the husband did not intend to give the wife any title at law or in equity which she had not before. His lordship then stated the facts of the case, drawing the conclusion, from the evidence, that the account was intended as a mere agency account by the husband, without any contract which could give the wife any interest in the money; and the order must be varied accordingly.

SIR W. M. JAMES, L.J., was of the same opinion. There were, no doubt, various modes by which a husband could make a gift to his wife so as to be effectual in this court, but the 90] question was *whether there was evidence of such a gift in this case, and his lordship thought that there was not.

⁽¹⁾ Law Rep., 14 Eq., 241.

⁽²⁾ 2 My. & K., 262.

⁽³⁾ 13 C. B., 474.

⁽⁴⁾ 8 Drew., 885.

⁽⁵⁾ 2 Sm. & Giff., 195.

⁽⁶⁾ 2 M. & S., 898.

⁽⁷⁾ 1 Atk., 270.

SIR G. MELLISH, L.J., was of the same opinion. The right of action at law was here in the administration of the husband and not in the wife. The rule at law was very well settled that a married woman could make no contract, but if a chose in action was given to the wife, either before or after marriage, the husband might either reduce it into possession or not, and if not, then it remained the wife's. But an ordinary banking account, supposing the husband to open it in the name of his wife, was, in fact, money lent with an obligation to repay it to the order of either the husband or the wife. That was a contract between the husband and the bankers that they would honor the checks of either husband or wife, but that was all. If the wife drew a check which the bankers refused to honor, any action brought upon that refusal could only be brought in the name of the husband. The contract must be pleaded, and could only be stated as with the husband, and not with the husband and wife. That had been the rule at law for a great many years, as appeared from the old case of *King v. Basingham* ⁽¹⁾, where it was held by the court that such an action could not be brought by husband and wife, because it was impossible that a wife could lend money.

His lordship did not think it necessary to determine whether, if the money was not lent but paid on a deposit account, or if the husband desired to make a present of it to the wife, and induced a third person to hold it to the use of the wife, and wrote to that effect, the case might not be different. The circumstances would then be the same as in *Fleet v. Perrins* ⁽²⁾. It was, however, not necessary to decide that question, and it was quite sufficient for the decision of this case to say that where money is lent upon a contract with the husband, it makes no difference that the account is opened in the name of the wife. That being the case at law, it was plain that there was here no equity, and the money must go to the estate of the husband.

Solicitors: Messrs. *Cole, Cole, & Jackson*; Messrs. *Rooks, Kendrick, & Harston*.

⁽¹⁾ 8 Mod., 199.

⁽²⁾ Law Rep., 4 Q. B., 500

See note 8 Eng. Rep., 718.

[Law Reports, 8 Chancery Appeals, 91.]

L.JJ. Nov. 11, 12, 1872.

91]

*HOOKHAM v. POTTAGE.

[1872 H. 117.]

Trade Name — Dissolution of Partnership — Use of Old Name of Firm — Tendency to deceive.

A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm; but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or is in any way connected with it.

The plaintiff, an old established tailor, took the defendant, who had been his foreman, into partnership, and the business was carried on under the name of H. & P. The partnership was afterwards dissolved by a decree of the court, in which it was provided that the business of the partnership should belong to the plaintiff. The plaintiff accordingly kept up the shop under the name of H. & Co. Subsequently the defendant set up a shop only a few doors from the plaintiff's shop, and painted over the door the words "P., from H. & P.":

Held (affirming the decree of Malins, V.C.), that, having regard to the manner in which the names were painted up, the defendant had done that which was calculated to lead the public to suppose that he was still connected with the old firm, and that the plaintiff was entitled to an injunction.

THIS was an appeal from a decision of Vice Chancellor Malins.

The plaintiff, Richard Parsley Hookham, had been carrying on the business of a tailor and draper at No. 3, Corn Market, Oxford, since the year 1836, and his predecessors had carried on the same business for more than a century. The business was carried on in the plaintiff's own name from the year 1836 to 1839, when he took a partner, who afterwards retired.

The defendant, Samuel Pottage, was originally a foreman of the plaintiff, who in 1851 took him into partnership. Differences arose which led to the filing of a bill by Hookham and a cross bill by Pottage, and to the decree made by Vice Chancellor Wickens in June, 1871, by which it was declared that the partnership between these persons should be dissolved as from the 3d day of June, 1871; and it was by consent ordered that the said Hookham should continue in the possession of the shop, 92] stock, business, and *assets of the partnership, and that it should be referred to an arbitrator to value the stock and effects of the partnership, and to ascertain the amount due to the defendant up to the date of the dissolution. Accordingly, the plaintiff continued to carry on the old business, and substituted the name of Hookham & Co. over the shop front for the name of the old firm, Hookham & Pottage.

In the month of April, 1872, the defendant took a large shop on the same side of the corn market, seven doors from the

plaintiffs, the appearance of which was very similar to that of the plaintiff's shop.

On the 26th of April the defendant, who had, in consequence of remonstrance from the plaintiff, obliterated the names which he originally placed over the shop front, painted up the words "S. Pottage, from Hookham and Pottage." The words "from" and "and" were in small capitals; but the words "S. Pottage," "Hookham," and "Pottage," were all in large roman capitals, "S. Pottage" being rather larger than the other two. The word "Hookham" was just over the door of the shop. The letters were gold on a dark green ground; the letters over the plaintiff's shop being gold on a red ground.

The plaintiff immediately remonstrated with the defendant, and threatened proceeds against him, and in May, 1872, filed the present bill, praying that the defendant might be restrained from painting or otherwise affixing the name of the plaintiff on or to the door or outside of the defendant's shop, or on the bill-heads, circulars, or advertisements used in his business, or from otherwise using the plaintiff's name in such a manner as to lead to the belief that the defendant was carrying on his former partnership business with the plaintiff, or that the plaintiff was in any way interested in the defendant's business.

The plaintiff moved for an injunction in the terms of the prayer, and it was agreed that the motion should be considered as the hearing of the cause.

Evidence was produced on the part of the plaintiff that two gentlemen and a little girl had been misled by the names or by the appearance of the shop, and had entered it by mistake for Hookham & Co.'s shop.

*The vice-chancellor granted the injunction prayed, and [93 the defendant appealed from the decision (').

(') 1872, June 6. SIR R. MALINS, V. C.: The question I have now to decide is, whether the manner in which the defendant uses the name of the plaintiff is or is not calculated to deceive. It is not necessary that I should come to the conclusion that there is any intention on the part of the defendant to mislead—that is immaterial. If it is calculated to mislead—that is, to lead the public into the shop of the defendant while it is their intention to go into the shop of the plaintiff—that is an injury done to the plaintiff. Then is it calculated to deceive, or is it not? My attention has been drawn to the fact that the affidavits are not very strong of any actual deception, and this is perfectly true; but there are

some instances, and although they may have occurred since the filing of the bill, yet I apprehend it is now well established that it is not necessary to prove acts of deception.

If the trade mark or the name is used in such a manner over a shop, as in *Glenny v. Smith* (2 Dr. & Sm., 476), which was the case so much relied on by counsel for the plaintiff, as that it is calculated to deceive, the court will restrain it. All these cases proceed upon this principle, that the thing done is calculated to deceive. Now, is the name in this case calculated to deceive? [His honor then referred to the evidence in the case, and continued:]

In all these cases I think common honesty requires that traders should so

94] *Mr Cotton, Q.C., and Mr. E. Culler, for the appellant: The defendant has done nothing more than he is entitled to do. He has a right to state that he was formerly in the house of Hookham & Pottage. He had been for many years manager of that business, and was probably better known to the customers than Mr. Hookham. He had a right to avail himself of the position which he had so gained, and the only course was to adopt the words, "From Hookham & Pottage." To support such an injunction as this there must either be actual intention to deceive, or such an imitation of the plaintiff's trade name as necessarily leads to deception: *Lee v. Haley* ⁽¹⁾; *Williams v. Osborne* ⁽²⁾. In the present case the evidence of persons being really deceived is most trivial.

Mr. Glasse, Q.C., and Mr. Jackson, for the plaintiff: It is not necessary for us either to prove cases of actual deception, or that

conduct themselves as not to do anything calculated to mislead the public. These tricks in trade, of one man trying by unfair means to get the customers of another, are very much to be reprobated. I am satisfied that this defendant is not so much anxious to let it be known that he has come from Mr. Hookham's shop as he is anxious to get Mr. Hookham's customers. Therefore I think that it is calculated to deceive; and being of that opinion, it cannot be permitted to continue.

Then with regard to the cases which have been cited upon the subject. Probably the only case which has any particular bearing upon this immediate question is that of *Glenny v. Smith*. The present case is rather a stronger one for the interference of the court. There it was stated that Thresher & Glenny, and their predecessors, had carried on business for 150 years. The house of business had always been in the Strand, and you can hardly suppose it possible that anybody wishing to deal with Thresher & Glenny would be misled by finding the name in Oxford street, where the defendant Smith, who had been in their employ, opened his shop. He put up a brass plate under his shop window with his own name in small letters transversely, "From Thresher & Glenny," and on the blind which he let down in warm weather there was the name "From Thresher & Glenny," and not his own name. Any person taking the trouble could see that it was not Thresher & Glenny of the Strand, for

it was of Oxford street. Upon what ground did the vice-chancellor grant the injunction? He says: "I am bound to come to the conclusion, even assuming that there was no intention on the part of the defendant to do wrong, that what he has done is calculated to mislead the unconscious, unwary, and heedless portion of the public into the impression that the shop of the defendant is the shop of the plaintiffs."

Therefore, looking at all the circumstances of this case, and to the manner in which the defendant has selected a shop close to the plaintiff's, I think it was his duty to avoid anything that could be calculated to deceive. He has put the name of "Hookham" in such a manner that it is not only calculated to deceive, but I think it was intended to deceive. There is evidence, certainly not very strong, that three persons at least have been deceived. Now that which has deceived in so short a time three persons, is obviously calculated to deceive others. Therefore, in my opinion, what the defendant has been doing is wrong, and he must be restrained. I must therefore grant a perpetual injunction, and order the defendant to pay the costs of the suit.

I desire it to be understood that I do not in the least degree interfere with the well established rule that a man having been in the employ of a trader of reputation is entitled in a fair manner to say that he comes from him.

⁽¹⁾ Law Rep., 5 Ch., 155.

⁽²⁾ 13 L. T. (N.S.), 498.

the defendant is acting fraudulently, if his conduct manifestly tends to mislead. By the terms of the dissolution of partnership the plaintiff is entitled to the goodwill of the old business, and the defendant has no right to make the public think either that his present business is a continuation of the old business, or that the plaintiff has any interest in it. The name Hookham is the valuable name in the business, having been so long known at Oxford, and that name is placed in the most prominent place over the defendant's door. The defendant has *brought [95 himself within the decisions in *Wutherspoon v. Currie* ⁽¹⁾; *Hudson v. Osborne* ⁽²⁾; *Labouchere v. Dawson* ⁽³⁾; *Glenny v. Smith* ⁽⁴⁾.

Mr. Cotton, in reply.

SIR W. M. JAMES, L.J.: I quite agree with Mr. Cotton that the defendant had a right to state that he was the Samuel Pottage who was formerly manager and afterwards a partner in the firm of Hookham & Pottage, and that he had a right to avail himself, by the statement of that fact, of the reputation which he had so acquired. But it is equally clear to me that he had no right to make that statement or to avail himself of that reputation in such a way as was calculated to represent to the world that the business which he was carrying on was the business of Hookham & Pottage, or that Hookham had any interest in it. The truth is, that the question to be decided is one of fact: whether the conduct of the defendant was calculated to mislead a casual passer by. The vice chancellor was of opinion that it was so calculated, and I cannot say that I differ from that opinion. As a matter of fact, it appears to me that the defendant has not taken the care which he ought to have taken to distinguish his own name from the name of the partnership, so as to prevent the public from being misled. Having regard to the position of the name "Hookham," and to the fact that the words "Hookham and Pottage" are in almost as conspicuous characters as "S. Pottage," I think that a stranger or an undergraduate who was not acquainted with Hookham's shop would be not unnaturally misled. The defendant might have made his own name far more conspicuous than that of the firm, either by making the name of the firm much smaller or of a different color; and if he could, it was his duty to do so, in order to make a clear distinction between them. It is a mere question of fact, and I have come to the same conclusion as the vice chancellor, namely, that the mode in which the defendant has placed the names over his shop is calculated to deceive the *public. The plaintiff is there- [96

⁽¹⁾ Law Rep., 5 H. L., 508.
⁽²⁾ 39 L. J. (Ch.), 79.

⁽³⁾ Law Rep., 13 Eq., 323.
⁽⁴⁾ 2 Dr. & Sm., 476.

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Wilkinson v. Clements.

L.JJ.

fore entitled to an injunction, and the appeal must be dismissed with costs.

SIR G. MELLISH, L. J., concurred.

Solicitors for the plaintiff: Messrs. *Pownall, Son, Cross, & Nott.*

Solicitors for the defendant: Messrs. *J. & R. Gole.*

See Moak's Van Santvoord's Pleadings, 841; and authorities there cited.

[Law Reports, 8 Chancery Appeals, 96.]

L. JJ. Nov. 14, 15, 1872.

WILKINSON v. CLEMENTS.

[1871 W. 136.]

specific Performance—Separable Contract—Agreement for Building—Leases.

C. agreed to let to W. several plots of ground for ninety-nine years, at one given rent, to be apportioned as hereinafter mentioned. W. agreed to build on plot P twenty houses, on plot B eight, on plot G ten, and on plot Y five; and it was agreed that a separate lease of plot B, at a given rent, should be granted as soon as four of the houses on that plot and two of the ten houses on plot G. were covered in, and that a separate lease of plot G should be granted as soon as five of the ten houses on that plot were covered in. W. mortgaged this contract to the plaintiff, and afterwards became insolvent. The plaintiff covered in the requisite number of houses on plots B and G, and applied for leases of them, denying at the same time his liability to take upon himself the other parts of the agreement, upon the performance of which the granting of leases of plots B and G did not by the terms of the contract depend:

Held, by Wickens, V.C., that the plaintiff could have no relief, except on his assuming W.'s obligations under the original contract, and that as the court could not enforce these obligations, relief could not be granted:

Held, on appeal, that as by the terms of the contract the right to have leases of plots B and G depended only on conditions which had been fulfilled, the plaintiff, as assignee of W., was entitled to have leases of those plots granted to him, without assuming W.'s obligations under the entire contract.

THIS was an appeal by the plaintiff from a decree of Vice Chancellor Wickens dismissing his bill without costs.

An agreement, dated the 21st of July, 1869, was entered into between the defendant Clements of the one part, and Edmund Wood of the other part, the stipulations of which were to the following effect: 1 That Clements should grant to Wood, his executors, administrators, and assigns, and that Wood, his executors, administrators, or assigns, should accept, such distinct and 97] separate *leases as were thereinafter mentioned, of a piece of ground at Turnham Green, delineated in an annexed plan, and colored pink, green, and yellow, for ninety-nine years from midsummer day, 1869, at a rent of a peppercorn for the first year, £50 for the second year, and £100 for every subsequent

year, the rents to be apportioned in manner thereafter mentioned, and paid on the usual quarterly days. 2 That Wood should build on the pink plot, on the east side of an intended new road shown on the plan, not less than twenty houses and on the green plot, on the west side of the road, not less than seventeen houses, each house to be of the prime cost of £200 at least, and to be of not less than certain dimensions therein mentioned. 3 That Wood would build on the yellow plot not less than five houses, such as therein mentioned. 4 That each house should be of the prime cost of not less than £200, and should be built of good, sound, substantial and new materials, in a workmanlike manner, and according to such plans and specification as should be approved by Clements or his surveyor. 5 That twelve houses should be finished, and fit for occupation, by midsummer day, 1870; twelve more by midsummer day, 1871 and the rest by midsummer, 1872. 6 That Wood should make the road, as shown on the plan, to the satisfaction of Clements' surveyor, and keep it in repair till taken to by the parish. 7 That Wood should make all drainage and sewerage at his own cost, and in such a manner as would best serve the interest of the estate, to the satisfaction of Clements' surveyor. 8 That Wood should be entitled to two separate leases of the plot colored pink as soon as he had built thereon and finished, ready for occupation, ten houses to the satisfaction of Clements or his surveyor, at the yearly rent of £25 for each plot colored pink; and two separate leases of the plot of land colored green, as soon as he had built thereon and finished, ready for occupation eight houses to the satisfaction, &c., at the yearly rent of £20 for each plot colored green; and a separate lease of the plot colored yellow, as soon as he had built thereon and finished five houses to the satisfaction, &c., at the yearly rent of £10. 9 That the leases should be prepared by the solicitor of Clements, his heirs or assigns, and be in the form agreed upon by Wood and Clements, and signed by them on the execution of the *agreement. 10 That the plans and elevations should be [98 submitted to Clements or his surveyor for approval, and his signature or that of his surveyor should be conclusive of such approval. 11 related to fire insurance. 12 reserved to Clements certain rights over the road. 13 Provided for Wood's putting up fences and gates in front of all the houses, building garden walls, &c. 14 That until all the land comprised in the agreement had been demised, Wood, his executors, administrators, and assigns, should, as to so much of it as should not have been included in any demise, pay the rent agreed, or so much thereof as should remain after allowing for the separate rent or rents payable under any lease or leases which should have

been granted, and would observe all the covenants on the part of Wood, his executors, administrators, and assigns, contained in the draft lease thereinbefore referred to, so far as they were applicable to so much of the premises as should not have been separately demised and the buildings to be erected, or which should have been erected thereon, and the works and things to be done or omitted with reference thereto, and that Clements, his heirs and assigns, should have a power of distress for rent in arrear upon the lands not demised, as if it had been reserved by a lease. 15 provided for reference of disputes to the arbitration of the lessor's surveyor. 16 That the agreement should not operate as an actual demise. 17 gave a power of re-entry for non-payment of rent in respect of lands not actually demised, and 18 provided that the lessee should not call for the lessor's title.

The form of lease referred to in the agreement purported to be a lease by Clements to Wood of a piece of ground situate on the side of a new street, intended to be called Belmont road, at Turnham Green, as the same was shown in the plan thereon, and all those messuages thereon, for the agreed term, at the rent of £ , and contained covenants by the lessee that the lessee, his executors, administrators, and assigns, would forthwith, at his and their own expense, complete and finish, fit for habitation and use in every respect, the said messuages or tenements thereby demised, according to the plan, elevations, and specifications already approved by the lessor's surveyor, and would at all times during the term bear and pay 99] a reasonable proportion to be *assessed by the lessor's surveyor, of the expense of supporting, cleansing, and repairing Belmont road, and of making, cleansing, and repairing all sewers, drains, party walls, &c., used or capable of being used in common by the lessee and the lessees of other parts of the estate. * It contained no covenant as to constructing the road, or any drainage thereon.

Wood commenced building on the plot colored yellow, and being in want of money applied to the plaintiff, and by an indenture dated the 5th of August, 1869, Wood assigned to the plaintiff, by way of mortgage, all the right, title, and interest of the mortgagor under the agreement, with full power and authority to do all necessary acts, deeds, and things for obtaining the leases thereby agreed to be granted, and for that purpose to use the name of the mortgagor in any suit or proceeding relating thereto; to hold the premises to the mortgagee for all the residue of the term mentioned in the agreement, subject to a proviso for redemption on payment by the mortgagor of such sums as should be due from him to the mortgagee, with in-

terest, according to the covenant thereafter contained. There followed a covenant by the mortgagor for payment of all sums which should be owing from him, with interest, and a covenant to complete the houses, with power to the mortgagee to enter if the mortgagor made default in observing any of the covenants in the mortgage.

The plaintiff soon afterwards purchased from Wood and Clements the plot colored yellow, with the houses which Wood had built upon it, and it was absolutely conveyed to the plaintiff by indenture of 30th of April, 1870.

On the same 30th of April, 1870, an agreement was entered into between Clements of the first part, the plaintiff of the second part, and Wood of the third part, which recited the original agreement, the mortgage and the conveyance of the yellow plot to the plaintiff, and recited that Clements and Wood, with the concurrence of the plaintiff, had agreed to make certain variations in the agreement, and that the plaintiff had agreed to join therein for the purpose of testifying his assent to the variations in the agreement, but not so as to make himself responsible in respect thereof. The only stipulations which need be referred to for the purposes of this report were: 4 That the ground rent to be *received in respect of the [100 land colored green on the plan annexed to the former agreement should be increased from £40 to £45, and that £25 thereof should be charged on such part thereof as was in the plan annexed to the second agreement colored blue, on which eight houses were to be built, and no more, and the remaining £20 thereof, on the part thereon colored green, on which ten houses were to be built, and no more; and that the lease of the land colored blue was to be granted by Clements as soon as four of the eight houses thereon and two of the ten to be erected on the land colored green in the second plan were severally covered in; and the lease of the land colored green was to be granted as soon as five of the ten houses to be erected thereon were covered in. 9. That, except as altered by the second agreement, the former agreement should remain in force.

On the same 30th of April, 1870, Clements signed and gave to the plaintiff a letter: "Sir, — I shall be willing to extend the time mentioned in the agreement of the 21st July, 1869, from midsummer, 1870, to Christmas, 1870."

By an agreement dated the 30th of June, 1870, between Clements of the first part, the plaintiff of the second part, and Wood of the third part, it was agreed that moneys advanced and to be advanced by Clements up to a certain amount to Wood to enable him to complete thirteen of the houses on the green and blue plots, with interest, as thereafter mentioned, should take

precedence of the plaintiff's security, and should be repaid by Wood, with interest at £7 per cent., at the time the leases were ready for execution; and that if Wood was not then prepared to pay the amount, and the plaintiff should fail to pay it for two months after demand, the amount of principal and interest should be satisfied by increasing the amount of ground rent to be reserved by the leases.

Wood, in the course of 1870, became insolvent, and the plaintiff proceeded with some of the houses. On the 19th of October, 1870, six of the houses on the green plot in the second agreement having been covered in, except the back offices or additions in the rear, the plaintiff wrote to Clements, asking him to have the leases prepared. After some correspondence, Clements, on the 25th, wrote to say that the lease of the green plot would be granted at once when the buildings were advanced [101] as required by the second *agreement. On the 23d of November, Mr. Smith, the plaintiff's solicitor, wrote to Mr. Avis, the solicitor of Clements, for a draft of the lease of the green plot. In reply, Mr. Avis sent a copy of a letter from Clements, inclosing one of a letter from Clements' surveyor to Wood, complaining that Wood was not proceeding in accordance with clauses 4, 7, and 10 of the first agreement, and declining to certify for a lease unless Wood adhered to the plans prepared for him, and fulfilled the clauses generally. On the 12th of December, 1870, Mr. Smith wrote to Mr. Avis, repeating his request for a draft lease of the green plot, and also asking for a draft lease of the blue plot, as the plaintiff would be entitled to a lease of it in the course of the week. On the 20th of December Mr. Avis wrote to Mr. Smith, stating that Clements had been over the ground with his surveyor, and found; 1 that the drainage and sewerage had not been commenced; 2 that the rain water pipes had not been put up; 3 That three division walls had not been put up; 4 that the boundary walls were not finished; 5 that the back offices in the blue plot were not finished; all which things he alleged must be done before the leases could be granted.

After some correspondence of rather a hostile character, the draft leases were furnished on the 3d of January, 1871. They contained covenants to complete fit for habitation the messuages thereby demised (being seven on the blue plot and six on the green) by midsummer, 1871, according to the specification which was sent along with them; and the draft lease of the green plot contained a covenant, on or before midsummer, 1871, to erect, complete, and finish fit for habitation four other messuages according to the specification. The specification,

beside other provisions to which the plaintiff objected, contained a provision as to laying down a twelve inch stoneware pipe in the roadway, and completing the roadway. Mr. Smith settled the draft leases and specification, making the plaintiff liable for only half the roadway, as the property demised lay wholly on one side of the road, and varying the covenant to complete the fresh houses by midsummer, 1871, into a covenant to finish them forthwith, on the ground that it was now impossible to complete them by midsummer, 1871, and the covenant in the signed form was to finish forthwith. On the 13th of March the drafts were returned by Mr. Avis with a letter, refusing *to assent [102 to the above alterations. Further correspondence and communications ensued, and on the 4th of April, 1871, Clements wrote to the plaintiff, saying that if the leases were not taken up within fourteen days, he should proceed in ejectment, and that, referring to the clause in the original contract which required twelve houses to be fit for occupation by midsummer, 1870, twenty-four by midsummer, 1871, and the rest by midsummer, 1872, he should not grant any further extension of time. The parties being unable to come to any understanding, Clements, on the 6th of May, 1871, commenced an action of ejectment, his solicitor writing on the same day to the solicitor of the plaintiff, saying that, as the plaintiff declined to accept the leases in the proposed form or to approve the specification, and as a quarter's rent was in arrear, Clements had instructed him to issue a writ in ejectment. The plaintiff thereupon filed the present bill, praying that it might be declared that the plaintiff, as assignee and nominee of Wood, was entitled to leases of the plots colored green and blue in the plan annexed to the supplemental agreement of the 30th of April, 1870, together with the houses or carcasses thereon, such leases to be according to the form of lease referred to in the original agreement, at the increased ground rents provided for by the agreement as to Clements' advances, and that such leases, and if necessary a proper specification and plan to be therein referred to, might be settled by the court, the plaintiff offering to execute counterparts and pay the ground rent, and that, so far as necessary for the purposes aforesaid, Clements and Wood might be decreed specifically to perform the original agreement as varied by the subsequent documents, and for all necessary inquiries, and for foreclosure against Wood, and for an injunction to restrain the action of ejectment.

A motion for injunction was ordered to stand over till the hearing, the plaintiff giving judgment in the ejectment to be dealt with as the court should direct.

At the hearing on motion for decree, Vice Chancellor Wickens dismissed the bill without costs ⁽¹⁾.

(1) 1872. May 29. SIR JOHN WICKENS, V.C., after shortly stating the circumstances of the case, continued:

The position, at Christmas, 1870, of Wilkinson, if he stood in Wood's place, was, that the whole of the agreement was to be performed by him, but that he was entitled, before it was performed, to certain privileges which, at least, in the hands of an assignee for value from him of the lands actually leased, would make the title to those lands independent of any subsequent failure by him to do his part.

It was indeed argued that the spirit of the arrangement between Clements and Wilkinson was, as between them, to separate the green and blue lands (which by common consent were to be first built upon) from the rest, so that Wilkinson might claim the leases when part of the agreement was performed, without liability to perform the rest of it. But this view seems not maintainable.

In general, a mortgagee by assignment, or any other assignee of a complete agreement of this sort, could enforce no term against the lessor without undertaking to do what the assignor had bound himself to do, and nothing short of an express agreement could relieve him from this. A mere reference by the lessor to the advantages which the assignee might obtain, without mention of the liabilities which he would incur by stepping into the assignee's place seems wholly insufficient for the purpose; and this is the utmost of what is to be found here.

No doubt Wood, if he had completed the nine houses on green and blue, might have got leases of those lands, which he could have sold or mortgaged to Wilkinson, and which would have imposed on Wilkinson no liability beyond what was actually to be done upon the lands leased—for example, no liability to make the road or to build on pink—and Clements must have relied on Wood for the completion of this latter part of his contract; but this was not the course which things took.

The only title of Wilkinson was under the assignment by Wood of the whole of the contract, and Wood was treated by both parties as having dropped out of sight in August or September, 1870, leaving Wilkinson in his place.

The mode in which the pink land is dealt with in the subsequent correspondence is an illustration of this. It would seem to follow, as already mentioned, that Wilkinson could not claim the blue and green leases except on condition of assuming all Wood's liabilities under the agreement. How this should have been done in point of form might have been doubtful.

Clements was entitled, before granting the blue and green leases, to some express recognition by Wilkinson of an equitable liability which Wilkinson would come under by claiming it. He was not entitled to have any stipulations inserted in the leases, except those affecting the lands leased, since the express object of the contract for anticipated leases was to separate the leased lands from the rest; or even, perhaps, to a covenant by Wilkinson, since the original agreement was not under seal. No wonder that when Wilkinson claimed the leases of blue and green, and an attempt was made to provide for the rights of the parties by stipulations in them, difficulties arose which proved insoluble. In their contentions as to these, both parties seem to me to have misunderstood their positions. Who was right and who was wrong upon this special point, is not now of importance. I think it, however, clear that, by the discussion as to the leases and what took place during it, Clements waived any right to insist on the exact times of completion which were mentioned in the contract. And having waived one, viz., that which required six houses to be completed and fit for occupation at Christmas, 1870, he was not entitled, I think, to announce on the 31st of March, 1871, when it was too late to complete eighteen houses by midsummer, that he would insist on this being done. Time may be *prima facie* of the essence of a contract like this, and a waiver of it as regards one date might not in all cases waive it generally; but here, where Clements had held out that the leases should be granted, and encouraged Wilkinson to go on after he knew that the required six houses would not and could not be completed at Christmas, he could not fairly give such short notice that he should stand on his strict rights as to the second term.

Therefore, when the bill was filed the

*Mr. Karslake, Q. C., and Mr. Bagshawe, for the plaintiff, [103 in support of the appeal: We admit that where a contract is one and indivisible, an *assignee who stands in the place [104 of the contracting party cannot obtain specific performance of part; but if the parties have made the contract divisible, the assignee may divide it. In the present *case Wood could [105 have insisted on separate leases of the blue and green plots before he had performed the rest of the contract, and so can the plaintiff. The vice chancellor was in our favor on the question of fact, whether the houses were covered in within the meaning of the contract. If the vice chancellor is right in his view of the law, the whole system of contracts for building leases will be upset. *Oxford v. Provand* ⁽¹⁾ is in our favor, and *Ogden v. Fossick* ⁽²⁾ is inapplicable, for there the contract was not made separable.

rights of the parties were these: Willkinson, supposing the evidence to show that nine houses had been covered in, was entitled to leases of green and blue, containing no stipulations except those as to what remained to be done of these particular lands; but, as a condition of getting them, he was bound to assume Wood's liability for the performance of the rest of the agreement, including the making of the road and the building on pink, and Clements could not refuse the leases on the ground that six houses had not been completed fit for occupation at Christmas, 1870, or that it was impossible to complete eighteen houses fit for occupation by midsummer, 1871, although he was entitled to a guaranty by Wilkinson for the completion, not only of the eighteen houses on blue and green, but of the twenty to be built upon the pink, and of the road, within a reasonable time.

Under these circumstances Clements brought ejectment to determine the agreement altogether; the pretext was that there was rent unpaid; but I am convinced that this was not the ground on which the ejectment was really brought.

On the case stated above the plaintiff would seem to have fair ground of complaint, and this court would desire to aid him if possible; but relief in equity could only be given on his assuming Wood's liabilities — amongst others, that of building on pink according to plans to be submitted to and approved of by the surveyor of Clements — and this court could not enforce spe-

cific performance in his favor unless it could see a mode of enforcing this liability.

This seems to be clear on principle, and also conformable to *Gervais v. Edwards* (2 D. & War, 80) and *Ogden v. Fossick* (4 D. F. & J., 426), both cases of highest authority, and the latter of peculiar importance, because it was decided after *Lumley v. Wagner*, which might have been thought, notwithstanding the express disclaimer of Lord St. Leonards, to qualify what was laid down by the same learned judge in *Gervais v. Edwards*. Now, according to *Brace v. Wenhert* (25 Beav., 348), a liability such as that of building on the pink plot (I say nothing of the road and sewers) is unenforceable in equity. It does not appear that anything which took place can be considered as an implied approval by Clements or his surveyor of the plans for those buildings.

It follows that the court can only give relief to Wilkinson on conditions of which it cannot compel the performance by him, which is tantamount to saying that it can give him no relief at all. The result is, that the bill must be dismissed as against Clements, but necessarily without costs. If the plaintiff has a right to relief elsewhere, he will be at liberty to pursue it. I determine nothing for or against his right in this respect. As against Wood, the plaintiff is entitled to the ordinary foreclosure decree if he thinks it worth while to take it.

(¹) Law Rep., 2 P. C., 135.

(²) 4 D. F. & J., 426.

Mr. *Greene*, Q.C., and Mr. *Graham Hastings*, for the respondent Clements: We do not rely on *Ogden v. Fossick*, which we admit to be distinguishable, but we do rely on *Gervais v. Edwards* ⁽¹⁾, which is, we submit, precisely in point. The agreement was one complete thing, and the court will not enforce any part of it in favor of the plaintiff when it cannot force him to perform his part: *Stocker v. Wedderburn* ⁽²⁾; and specific performance of an agreement to build cannot be decreed: *Bruce v. Wehnert* ⁽³⁾. It is true that in some cases the court will oblige a party to enter into a covenant to do certain acts, though it could not decree him to do the acts; but that doctrine does not apply where the party seeking relief is repudiating part of the agreement. There is no authority in support of the proposition that an assignee of a contract can get any relief here if he repudiates part of the contract. The evidence shows that the 106] rain spouts were not set up in time, *and that houses are not considered "covered in" until the spouting is complete.

SIR W. M. JAMES, L.J.: This is an appeal from a decree of the Vice Chancellor Wickens dismissing the plaintiff's bill without costs. The judgment of the vice chancellor proceeded upon one ground, an important ground, as applicable to this particular kind of contract. But, independently of that ground, other defenses were taken by the evidence, there being no pleadings except the bill. I think it proper to deal first with a defense, which, if true, would have been a complete defense to the bill, namely, that the buildings were not covered in by the time and in the manner which were required by the agreement before the lease of this particular part of the property should be granted. The only evidence in support of this defense is that there were not water pipes put up, and evidence is given by several surveyors that water pipes ought to be put up before a house can be said to be, strictly speaking, "covered in." What that amounts to, whether it is anything more than the mere trivial expense of pence or shillings, is not stated. It is, however, reasonably clear that a water pipe to a cottage costing £200 must be a matter causing only a trifling expenditure, much too trivial, I think, to afford a ground for saying that a builder who had omitted it had not completed his contract for the present purpose. It might almost as well be said that if a slate had been blown off the houses were not covered in. On the other hand, a great number of witnesses say that the houses were covered in "according to the plans." They do not, indeed, apply themselves directly to the question of the water pipes; but they have not been cross examined. It is, moreover, quite clear, from the specification sent in on the 3d of

(1) 2 D. & War., 80.

(2) 3 K. & J., 898.

(3) 25 Beav., 348.

January by the defendant's surveyor to the plaintiff, that the houses were then treated as covered in, although no water pipes were then fixed, and that the surveyor, who is the best witness as to what was understood between themselves as to covering in, does not in any way say that the buildings were not covered in at that date. I think, therefore there is no weight in this objection.

It is then said that it would be utterly impossible to perform *this agreement, because it provided that the buildings [107 were to be according to the plans and specifications that were to be submitted to the surveyor and approved of by him, and that such plans and specifications were not submitted and approved. The surveyor says that a plan was submitted to him by Wood, upon which improved plans were subsequently prepared by him and copies furnished to Wood, and that the houses which have been in part erected are in accordance with such plans. If there was any default on the part of the plaintiff or Wood as to sending in plans and specifications, it was committed at the very beginning, and not only did the defendant allow the building to go on, but he superintended it, and was party to an arrangement by which the benefit of the agreement was assigned to the plaintiff by way of security; and, by a tripartite arrangement between Wood, the plaintiff, and Clements, the defendant, Clements himself advanced money and took a security, for which he obtains precedence over the plaintiff's security upon these very houses, which, of course, therefore, must be understood to have been built to his satisfaction. The only object of the stipulation that plans and specifications are to be sent is, that the ground landlord may have sufficient control over the nature of the buildings, and as he has practically approved what has been done, I am of opinion that he has entirely waived the stipulations as to plans and specifications.

The question then resolves itself into this, Is the decision of the vice chancellor correct that the plaintiff, being assignee of the whole of the contract, is unable to obtain specific performance in this court without putting himself under an obligation to perform the whole of what the agreement bound Wood to perform? I am of opinion that there is no authority, and I am unable to find any principle, for imposing that term as a condition precedent upon a person in the plaintiff's position in respect of a contract of this kind. The contract is made in its terms a divisible contract. It is made separable with respect to the leases, and it is so made, as it appears to me, for the very purpose of avoiding the application of any such rule. In truth, if that rule were held to apply in this case, all contracts of this nature would come to an end—a landlord could not enter into

a building agreement of this kind with any chance of its being [108] carried into effect. It is well known *that a builder is seldom a person with money enough to complete the whole of the buildings which, by a contract of this sort, he undertakes to erect; in order, therefore, to enable him to raise funds for the purpose, the contract is made divisible, and provides that as soon as he has built to a certain extent on certain portions of the land, he shall have separate leases of them, which he can take into the market for the purpose of raising money to enable him to complete the rest of the contract; that as soon as he has built upon other portions he shall have a lease of them; and that when he has completed the whole he shall have leases of the remaining part, all distinct and separate leases, the lessees in which would be under no obligation whatever to perform the obligations of the others. Then it appears to me if Wood had come here and said, "I have completely covered in the buildings on the green and blue plots according to the terms of the contract, and I am now entitled to have leases granted to me of those plots," it would have been no answer to him to say, "We do not know whether you will ever perform the rest; we cannot grant specific performance of this, as we are unable to grant specific performance against you of that part which remains unperformed." This would be entirely inconsistent with the true meaning of the parties, which was that he was to have leases of those plots as soon as he had covered in the houses on them, whether anything could or could not be done as to the other parts. If such would have been Wood's position, is the plaintiff in any worse position? I am of opinion that as soon as Wood was entitled to a lease of a particular plot he could have assigned that right to the plaintiff, and he might have made a separate assignment to somebody else of his right to a lease of a second part and have retained the third part to himself. If he had done that, it would, as it seems to me, have been impossible to say that specific performance is not to be granted to the assignee of part, because he does not take upon himself to perform the whole residue of the original agreement. It appears to me that if Wood had performed the conditions as to these plots, he would have been in a position to ask for specific performance as to them, and could have been put on no new terms or conditions whatever with respect to the residue; and if the plaintiff had filed this bill in the name of Wood, which, it appears to me, he [109] might very well have *done under the power of attorney given to him in his mortgage deed, asking the landlord to grant a lease to Wilkinson as the nominee of Wood, it would be no answer to say, "You, Wood, have entered into an agreement with Wilkinson, by which he may be entitled to the whole

agreement; and I will not do anything until Wilkinson has put himself in some way in your place." That would have been no answer, any more than it would have been an answer to an action at law in the name of Wood for breach of the undertaking of the landlord to grant a lease.

It cannot make the slightest difference what the form of agreement was between Wood and Wilkinson, that being a matter with which Clements really had nothing whatever to do. Wood and Wilkinson, the day before the bill was filed, might have altered the whole arrangement as to the mortgage, and confined it to this specific portion. If so, the landlord could not have said, "No doubt at present you are only assignee of part, but there was a time at which you were assignee of the whole; and if you had been assignee of the whole, and had sued as such, I could have insisted upon your entering into some undertaking or agreement to perform the covenants; and because that once existed, I say you have no right to go to your mortgagor and try to put yourself in the position of assignee of part." It appears to me that this would have been perfectly idle. No injury is done to the ground landlord by treating the contract as separable; he has got a particular portion of his property covered with houses, finished to a certain extent, and he will have a lessee of those houses, who, having laid out money already to a considerable amount upon them, will, for his own sake, be anxious to complete them, and make them fit for habitation, and will be bound to pay him the ground rent. With regard to the remaining ground, he still retains exactly the same right he had under the agreement, that is to say, he has got the right against Wood which he always had; and I cannot find any obligation or condition implied in this contract, that if the intended lessee shall assign to anybody, that assignee shall enter into a distinct and separate agreement and covenant on his part to perform the whole agreement. Wood remains liable to perform it as to the rest of the property; if he does not perform it, the landlord gets the property, and in this case he has got possession, which he will retain because Wilkinson does *not [110 seek to interfere with it. That being so, I differ from the vice-chancellor in the ground of his decision, and I hold that the plaintiff was entitled to specific performance of the agreement, so far as it relates to the distinct leases of these two particular portions of ground upon which he has built the houses, and that he was not required, in order to entitle him to that, to enter into any agreement or obligation or undertaking of any kind to take upon himself the liability of Wood with respect to the remaining part of the property. It appears to me that the cases which have been cited, and which are to this effect, that if the

thing must be performed at all, it must be performed *in toto* by this court, can have no application to an agreement like this, which in its very terms, and from its very nature, contemplated successive performances of successive parts independently of one another.

I am of opinion that the plaintiff is entitled to a decree for specific performance, with a declaration that the clause as to plans and specifications has been waived. Refer it to chambers to settle a lease, and the plaintiff must have his costs of suit.

SIR G. MELLISH, L.J. : I am of the same opinion, and wish only to add a few words as to the important question upon which the vice-chancellor has decided this case. I quite agree that as a general rule all agreements must be considered as entire. Generally speaking, the consideration for the performance of the whole and each part of an agreement by one party to it is the performance of the whole of it by the other, and if the court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of it on his part, the court will not compel the defendant to perform his part or any part of the agreement. As a general rule, therefore, an agreement is entire. I can also conceive that a court of equity might treat an agreement as entire even in cases where a court of law would say that the performance of one part is not a condition precedent to the performance of the other part, because the court might see that those rules as to conditions precedent, which to a certain extent are technical, might not meet the real justice of the case. But, on the other hand, I do not find it laid down anywhere that it is impossible for the parties so to frame [11] an *agreement that there may be a specific performance of part. For instance, if they had said in terms, "this agreement is to be construed as if it were three separate agreements for the several portions," nobody, I suppose, would doubt that the court would treat it as if there were three separate agreements, and would not say, "If you meant them to be separate agreements you ought not to have them put on the same piece of paper, but on three separate pieces." That being so, it is really a question of construction whether practically that is not what the parties have done, and the court ought to carry out the agreement according to what it sees is really the intention and object of the parties in making it.

Looking at this agreement, it is in a form not at all unusual in agreements for a large amount of building between a ground landlord and a builder, and it appears to me that the agreement that separate leases should be granted, not at the same time, but at different times, with a considerable interval between the time when the lease of one plot is to be given and the time

when the lease of another plot is to be given, evidently shows the parties to have contemplated that the houses were to be built in succession, and that those on the pink plot were to be built last. That is done that the builder may have an opportunity of raising money by selling or mortgaging a part before he has completed his agreement for the whole. That is obviously for the benefit of both parties, because it is a plan which makes it most probable that the builder who makes the agreement with the ground landlord will be enabled to fulfill the whole of his agreement. If he does not fulfill the whole of, at any rate he will fulfill a part of it, and the ground landlord will obtain what he desires to obtain, namely, leases, with houses built upon his land so as to secure to him the ground rent. When such an agreement has been made, and a person who is willing to advance money to the builder for the purpose of performing it, having seen the agreement and seen the object of it is willing to assist him by lending him money for building houses on some part, it appears to me that it would be most unjust if, after he had advanced his money upon the footing that there was to be a separate lease granted when a certain number of the houses were built, his object were to be defeated, and the landlord to be held entitled to say, "I shall not grant you a *lease of [112 that part unless you will undertake to build the whole." I confess I do not see how, if he did give that undertaking, he could even then be entitled to the specific performance of part, because the rule, when an agreement is really entire, is, that the court will not perform a part unless it can compel the actual performance of the whole. Now it is settled that, as a general rule, the court will not compel the building of houses. Therefore, if this were to be treated as being an entire agreement, it seems to me that no specific performance could be granted at all until the whole of the houses had been built. That appears to me entirely contrary to the agreement of the parties, for their intention appears to me clearly to have been that the landlord should be compelled, as between him and Wood, to grant a lease of a part when a sufficient number of houses were covered in upon that part; and that being the agreement with Wood, why should Wood not be able, according to the ordinary rule of law, to assign, either by way of sale or mortgage, that part to which he was so entitled, for the purpose of raising money? It appears to me that he must be so entitled. How can it make any difference that in fact he mortgaged the whole of the agreement to the plaintiff instead of mortgaging a part? I cannot see that it makes any difference. The case decided that where an agreement is entire the court cannot grant any specific performance unless it is in a position to grant specific performance

of the whole, but I do not find any case which says that an agreement cannot be so worded that a party may have specific performance of a particular part of it, although he has not performed, and possibly never will perform, the rest of it; nor do I find any case which says that an assignee may not be in the same position. I therefore cannot agree with the judgment of the vice chancellor, and I think we should do great harm to all the parties interested in such agreements, and especially to ground landlords, if we held that this agreement could not be carried out according to what appears to me to be the true meaning of the parties.

Solicitors: Mr. F. R. Smith; Mr. H. Avis.

[Law Reports, 8 Chancery Appeals, 118.]

L. JJ., Dec. 16, 1872.

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*In re ASHMEADS TRUSTS.

Re-transfer of Stock transferred to National Debt Commissioners—Accumulations—Legal Holder—National Debt Act (33 & 34 Vict. c. 71, ss. 54, 55).

Stock standing in the name of a deceased trustee having been transferred to the commissioners for the reduction of the National Debt, a person claiming to be the legal personal representative of the beneficial owner petitioned for a re-transfer:

Held (reversing the decision of Malins, V.C.), that an inquiry, who was entitled, could not be directed in the absence of the personal representative of the trustee:

Held, also, that a claimant who establishes his claim has no title to any accumulations arising from the investment of the dividends, his right being to have the stock re-transferred and the amount of unpaid dividends paid to him in cash, without interest.

THIS was an appeal by the attorney general and the commissioners for the reduction of the national debt from an order of Vice Chancellor Malins.

Charles Ashmead, by his will, dated the 5th of December, 1840, bequeathed a leasehold house to the petitioner, William Ashmead, and G. B. Ashmead, upon trust to sell and invest the proceeds in the government funds, and during the life of his daughter Eliza Maria to pay the dividends to her for her separate use; and after her decease, then, subject to any life interest which she might give to any husband surviving her, under a power given her for that purpose, the testator directed the trust funds to be held in trust for all the children of his daughter who should attain twenty-one, and in default of such children, in trust for his sons, Charles B. Ashmead and W. J. Ashmead, their executors, administrators, and assigns, to be

divided between them; or if one of them should be dead at the decease of his daughter and failure of her issue, then to the survivor. And the testator gave the residue of his personal estate and effects to the petitioner and G. B. Ashmead upon trust as therein mentioned, and appointed them executors of his will.

By a codicil dated the 4th of April, 1844, the testator revoked the appointment of the petitioner as one of the trustees and executors of his will, and appointed his son-in-law, F. Preston, to be trustee and executor in the place of the petitioner.

*The testator died on the 15th of April, 1844, and his [114 will was proved by both his executors, who sold the leasehold house and invested the proceeds in the purchase of £2313 14s. 9d. £3 per cent. annuities.

The testator's daughter married F. Preston in July, 1841, and by her will, dated the 8th of October, 1845, she gave her husband a life interest in the fund, and appointed him her sole executor.

In 1849 F. Preston and his wife went to Australia. The wife died in July, 1853, without leaving issue.

George B. Ashmead died in September, 1859, leaving F. Preston, his co-trustee, surviving. F. Preston married again in August, 1861, and by his will, dated in 1860, he appointed his wife his executrix. In 1861 F. Preston sold out £500 from the settled fund for his own use, which reduced the amount of stock to £1813 14s. 9d. F. Preston died in January, 1863, at Adelaide, and his will was proved by his widow in Australia in March, 1872; but no representation had been taken out to him here. The testator's sons, Charles B. Ashmead and W. J. Ashmead, had died intestate, and letters of administration had been granted in both cases to the petitioner.

No dividends had been received upon the £1813 14s. 9d. annuities since the year 1861, and the stock had been transferred to the national debt commissioners in accordance with the 51st section of the National Debt Act, 1870.

The petition prayed that the bank of England might be ordered to transfer such stock into the petitioner's name, and also to transfer all investments arising from the dividends which had accrued thereon since the transfer to the commissioners, and the accumulations thereof, and to pay over to him any uninvested dividends, and that, if necessary, such inquiries as to the persons entitled to the said sum of bank annuities might be made, and directions, given as to the court should seem right.

Vice Chancellor Malins ⁽¹⁾ directed an inquiry who was or

(1) 1872. July 17. SIR R. MALINS person who, if the statements in the V.C.: This petition is presented by the petition turn out to be true, is abso-

[115] were *entitled to the £1813 14s. 9d. bank £3 per cent. annuities standing in the names of G. B. Ashmead and F. Preston, and afterwards transferred to the commissioners for [116] the reduction of the national *debt, and to the dividends which had accrued due thereon since July, 1861, or should accrue due thereon, and to the stock arising from the investment thereof.

The commissioners appealed.

The *Solicitor General* (Sir G. Jessel), and Mr. Hemming, in

Intely entitled to the stock. Therefore, if no objection had been made, and I had every one here legally and actually entitled, it would be my duty now at once to make an order to transfer the stock. received by the commissioners for the reduction of the national debt to the petitioner. But the legal personal representative of the surviving trustee, Frederick Preston, is not present, and the national debt commissioners have urged before me that I ought not on that account to make a reference to chambers to inquire who is entitled to the stock. In my opinion that is no reason whatever for not directing the inquiry, because the legal personal representative may be constituted during the inquiry, and I may have it answered that the person legally entitled is the legal personal representative of the surviving trustee, and that the petitioner is the legal personal representative of the two beneficiaries, and is beneficially entitled to the stock. If I were to accede to Mr. Hemming's argument there would be a delay of a year in order to get the presence of the legal personal representative, and then at the end of the year I should be applied to, to direct the inquiry, which I think might just as well be directed now. I therefore have, on the one hand, the great advantage of preventing delay, and I have on the other hand the advantage that it is impossible that the inquiry can do any mischief to anybody, because the inquiry will be attended both by the attorney general and by the commissioners for the reduction of the national debt. I shall then have the persons before me, and I shall be able to make an immediate order if necessary for the transfer, instead of allowing the delay which would take place if I adopted the course suggested.

Mr. Hemming has said that such an order is never made except in the presence of the legal personal representa-

tive of the owner of the stock. That is not according to my recollection or experience, and it will not, in my opinion, make the least difference. I do not think it is the principle of the court that it will not make the order except in the presence of the legal owner or in the presence of the legal personal representative of the owner. If this had been an application for a vesting order, that is, if the stock had not been transferred to the commissioners for the reduction of the national debt, I should have been able, upon these materials, to make an order vesting the stock in the person entitled. If the result of the inquiry shows, and if it should turn out that this petitioner is absolutely entitled to the stock, and that the only difficulty in the way is the absence of the legal personal representative, I shall then, under the trustee relief act, be able to declare that there is a trust, and to make a vesting order, and in that way the attorney general will be relieved, and the commissioners will be relieved, of all difficulty. I think this is a clear case for a reference to chambers. I shall use the old form, except that I shall avail myself of the additional language of the new statute of 1870, which includes the dividends and stocks arising from the investment of the money, because that is what the national debt commissioners are directed to hold for the public subject to the claim of the owners. The inquiry will therefore be, who is or are entitled to the £1813 14s. 9d. bank 3 per cent. annuities standing in the names of G. B. Ashmead and F. Preston, and afterwards transferred to the commissioners for the reduction of the national debt, and to the dividends which have accrued due thereon since July, 1861, or shall accrue due thereon, and to the stock arising from the investment thereof.

support of the appeal : The order cannot be made in the absence of the legal personal representative of the person in whose name the fund was standing. A claimant is first to apply to the bank, and the bank, if satisfied as to his title, may re-transfer to him ; if the bank is not satisfied, he is put to his petition. Now no one but a legal owner could apply to the bank for a re-transfer. The vice chancellor appears to have misapprehended *Ex parte Ram* ⁽¹⁾. That case decided that the *cestui que* trust must be before the court, not that the legal holder need not. Then the order is wrong in dealing with the accumulations : 56 Geo. 3, c. 60 ; 33 & 34 Vict. c. 71, ss. 54, 55. There is no difference (beyond mere verbal improvements or supposed improvements) between the two statutes. The act of 1870 is on this subject only a consolidation act.

Mr. Bristowe, Q.C., and Mr. Wintle, for the respondent : The old act only ordered payment of the dividends, but the recent act deals also with the accumulations. *Edgar v. Reynolds* ⁽²⁾ supports the claim. Then, as to the necessity of having the legal personal representative here, the case is like that of a sole trustee out of the jurisdiction, in whose absence a vesting order could be made. The inquiry ought to go on, for the stock cannot be received until a legal personal representative is constituted, so no harm can be done.

[The Solicitor General : There is no one to check the inquiries.]

The bank can do so. The observations of Lord Cottenham in *Ex parte Ram* are strong in our favor. In *Ex parte Gillett* ⁽³⁾ *an inquiry was directed to ascertain in effect whether one [117 of the petitioners was the legal owner, and this in the absence of another person alleged to be the legal owner in trust for the other petitioner.

SIR W. M. JAMES, L.J. : The first objection made by the appellants to this order is, that it ought not to have been made in the absence of the legal owner of the fund. I am of opinion that this objection is well founded, and that no inquiry ought to have been directed in the absence of the legal owner, he being the person whose duty it is to watch the inquiry as to who are beneficially interested. The case *Ex parte Ram* ⁽¹⁾ only decides that the fund will not be paid to the legal owner in the absence of the persons beneficially interested. As to the accumulations, with all respect to the vice-chancellor, I am unable to see any ground for holding that the person who establishes his title has a right to anything more than a retransfer of the stock, and payment of the unpaid dividends. I see nothing in the act of 1870

⁽¹⁾ 8 My. & Cr., 25.

⁽²⁾ 4 Drew., 269.

⁽³⁾ 8 Madd., 28

to give him any right to the stock in which the dividends have been invested. Such a right would be an entirely new right — a title in a creditor to investments made by a debtor with the money remaining in his hands. This would give him the profits of the investments, if good, without his being liable to loss if they turned out unprofitable. The order of the vice-chancellor must be discharged with liberty to amend the petition, and bring the personal representative of the deceased trustee before the court.

SIR G. MELLISH, L.J.: I am of the same opinion. I think that sect. 54, if standing alone, would not be sufficient to give the owner of the stock a right to the accumulations. But if there be any doubt upon that section, it is removed by sect. 55, which says plainly that he is to get back the stock and the dividends upon it, and this is not consistent with a title to the accumulations.

Solicitors: Messrs. *Raven & Bradley*; Messrs. *Edwards, Layton, & Jaques*.

[Law Reports, 8 Chancery Appeals, 118.]

L. JJ. Nov. 20, 22, 1872.

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TORRANCE V. BOLTON.

[1870 T. 68.]

Vendor and Purchaser — Sale by Auction — Misleading Particulars of Sale — Conditions of Sale read but not printed.

Certain property was put up for sale by auction, and in the particulars which were advertised was described as an immediate absolute reversion of a freehold estate falling into possession on the death of a lady in her 70th year. By the conditions of sale, which were read in the auction room just previously to the sale, but were not printed or circulated among those present, the property was stated to be subject to three mortgages. The property was bought by the plaintiff, who stated that he was deaf and did not understand that he was buying an equity of redemption:

Held, on a bill filed by the plaintiff to have the contract for sale rescinded, that the description of the property in the particulars of sale was misleading, that the onus was therefore on the vendor to show that the purchaser was not actually misled, and that as he had failed to do so the plaintiff was entitled to have the contract rescinded and his deposit returned.

The decision of Malins, V.C., affirmed.

There is no general rule that actual fraud is necessary to induce a court of equity to rescind a contract for sale. The court acts on the same principle in rescinding contracts for sale as in setting aside other contracts and dealings which it considers unconscionable.

*Affirming 3 Eng. Rep., 674.

THIS was an appeal from a decision of Vice-Chancellor Malins ⁽¹⁾.

The bill was filed by Dr. Torrance, living at Rugby, to be relieved from a contract to purchase some land from the defendant under the following circumstances.

On the 8th of January, 1870, the defendant's solicitor inserted in the *Rugby Advertiser* the following advertisement:

"Clifton-on-Dunsmore, Warwickshire.

"Preliminary Announcement.

"Mr. W. Cropper will offer for sale by auction on an early day the absolute reversion to all that valuable freehold estate situated as above, and containing 75A. 2R. 19P., or thereabouts, now in the possession of Mr. W. Bull. The reversion falls into possession on the death of a lady now in her seventieth year. For further particulars apply to Mr. Edmund Harris, solicitor, or to the auctioneer, Rugby."

*Soon afterwards fresh advertisements were issued in [119 the following terms :

"Clifton-on-Dunsmore, Warwickshire.

"Valuable Freehold Estate.

"Mr. William Cropper begs to announce that he is instructed to offer for sale by auction (unless the same is previously disposed of by private contract, of which due notice shall be given), on Tuesday, the 8th of February, 1870, at the Lawrence Sheriff Arms Hotel, Rugby, at 4 o'clock in the afternoon, and subject to the conditions of sale to be then read, all that the immediate reversion in fee simple of and in all the valuable farm and lands, containing 75A. 2R. 19P., with suitable farmhouse and buildings thereon, situate and being at Clifton-on-Dunsmore aforesaid, as the same is now in the occupation of Mr. William Bull as tenant from year to year.

"The reversion falls into possession on the death of a lady now in her 70th year.

"For further particulars, and to treat for the purchase, apply to Mr. Edmund Harris, Solicitor, Rugby.

"Dated 14th January, 1870."

The plaintiff read these advertisements, and in consequence applied to Mr. Hefford, a clerk of Mr. Harris, the defendant's solicitor, and asked him for information as to the property. It was asserted by Hefford, but denied by the plaintiff, that Hefford informed him of the fact that the property was mortgaged to the extent of £2499. There was also a conflict in the evi-

(1) Law Rep., 14 Eq., 124.

dence as to the real value of the property, and as to the estimate of the value given by Hefford to the plaintiff.

No further particulars of the property were published, and no conditions of sale were issued. The auction was held on the 8th of February, 1870, and the plaintiff attended the auction. Before the property was put up, the auctioneer's clerk read aloud the particulars and conditions of sale from a manuscript, but no copy of the document was handed to the persons who attended the sale. The particulars as stated in the document were as follows: "All that the immediate absolute reversion in fee simple of and in all the valuable farm and lands, containing 75A. 2R. 19P., with suitable farmhouse and buildings thereon, situate [20] and being at *Clifton-on-Dunsmore aforesaid, as the same is now in the occupation of Mr. W. Bull, as tenant from year to year, falling into possession on the death of a lady now in her seventieth year."

The first condition of sale reserved the right to the vendor or his agent to bid once for the property.

The fourth condition was as follows: "The estate, the absolute reversion to which is the subject of the present sale, is subject to two several mortgages, created by the vendor's predecessors in title: one for securing the principal sum of £1500, and interest at the rate of £4. 15s. per centum per annum, and the other for securing the principal sum of £499 and interest at the rate of £4. 10s. per centum; and the vendor has by an indenture bearing the date of 13th of June, 1869, charged the reversionary estate with a sum of £500, and interest at the rate of £5 per cent. per annum. The purchaser shall take a conveyance subject to the three said several mortgages, and shall pay interest to the mortgagees on the said principal sum of £500, from the 25th March next, all interest on the said sum up to that day being paid by the vendor. The interest on the said respective sums of £1500 and £499 is paid by the person entitled to the rents and profits of the said estate for life. The sale is also made subject to any claims made for succession or other duty which may arise on the death of the tenant for life."

The plaintiff, who was in his seventy-third year, and very deaf, was, as he alleged in the bill, unable to hear the conditions distinctly, but believing them to be merely of a formal character, he bid at the sale, and the property was knocked down to him at £2500. The plaintiff made the first bid, which was £2000, and he stated that he did not observe any one else besides himself bidding, but the auctioneer from time to time called out an advanced price, whereupon the plaintiff continued his bidding.

The deposit was not, however, in fact, paid till the next day, when the plaintiff's solicitor called at the office of the defend-

ant's solicitor, and gave him a check for £250. Before paying the money he was shown a copy of the conditions of sale, and at once stated that he believed the plaintiff did not know that he was buying subject to incumbrances.

*On the 10th of February, the plaintiff's solicitor was [121] furnished with a copy of the conditions of sale, and the plaintiff then, as he alleged, first became aware of the effect of the 4th condition.

On the 26th of February, the plaintiff's solicitor wrote to the defendant's solicitor the following letter :

" Dear Sir: I have had a very long interview with Dr. Torrance, who is anxious to be released from his contract, in consequence of the misapprehension he was under both previous to and at the sale, as to any incumbrances being on the property which the purchaser would be liable to pay. Previous to the sale Dr. Torrance had read only the particulars of sale, which described the property sold as an absolute reversion, whereas it turns out that it is only an equity of redemption of and in such reversion. Dr. Torrance had not read the conditions of sale; being very deaf he did not hear them read at the sale, and knew nothing of the mortgages mentioned in the fourth condition, but being misled by the description of the property in the particulars of sale, he supposed he was purchasing the absolute reversion therein mentioned, and bid accordingly for it, and not for a mere equity of redemption, subject to mortgages which would double his purchase money. He was also induced to bid up to the amount he did, in consequence of a conversation he had with Mr. Hefford previous to the sale, when he informed Dr. Torrance that your reserve was £3000. Under these circumstances, Dr. Torrance is desirous of having the contract rescinded and his deposit returned, and is willing in such case to pay all the expenses of and incident to the sale."

The defendant declined the offer contained in this letter, and commenced an action against the plaintiff on his contract, which however he afterwards withdrew; and after some further correspondence the plaintiff filed the present bill on the 30th of May, 1870, praying that the contract of the 8th of February, 1870, might be declared to be rescinded, and might be delivered up to be cancelled, and that the plaintiff might be declared to have a lien upon the defendant's interest in the property comprised in the sale for the amount of the deposit and the costs of the suit.

The vice-chancellor declared the plaintiff entitled to the relief prayed, and from this decision the defendant appealed.

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122] *Mr. Pearson, Q.C., and Mr. Nugent, for the appellant :

The onus is on the plaintiff to prove that he made the contract under a mistake, which he has failed to do. The defendant's witness swears that he told the plaintiff that the property was subject to mortgages. The plaintiff cannot complain if he did not understand the conditions of sale. He knew that they were being read, and it was his duty to listen to them, and if necessary, to have them explained. The evidence shows that it is the custom in that part of the country for conditions of sale to be so read without being printed, and that custom is recognized in *Lee v. Dawson* ⁽¹⁾. It is said that the mortgages ought to have been mentioned in the particulars of the property but it is very usual to mention incumbrances, such as rights of way or the reservation of minerals, in the conditions of sale only. And even if the plaintiff had clearly proved that he was under a mistake, the court would not on that ground rescind the contract. For that purpose it is necessary that there should be fraud: *Onions v. Cohen* ⁽²⁾, *Sugden's Vendors and Purchasers* ⁽³⁾. The case relied on by the vice chancellor in his judgment, *Stanton v. Tattersall* ⁽⁴⁾, was not a simple case of mistake. There was an actual misdescription of the property sold. It was stated to be a house in Pall Mall, whereas it was not in Pall Mall at all; the purchaser therefore did not get what he bargained for. The price in the present case is not preposterous, and the allegation that the vendor ran up the price by bidding more than once, is no ground for setting aside the contract: *Dimmock v. Hallett* ⁽⁵⁾. At any rate the plaintiff delayed too long before filing his bill. He ought to have repudiated the contract at once.

Mr. Kay, Q.C., and Mr. Rigby, for the plaintiff, were not called on.

SIR W. M. JAMES, L.J.: Since the close of the arguments by the appellant's counsel we have had an opportunity of considering this case, and we do not think it necessary to call upon Mr. Kay to say anything to us. Being of opinion, as I am, that the decree of the vice chancellor ought to be affirmed, and concurring as I do entirely in the judgment which the vice chancellor pronounced, it is not necessary, I think, to say much by way of reason for affirming that decision.

I agree with the vice chancellor that the description of the property in the particulars of sale was an improper, insufficient and not very fair description. It was not right to describe as an absolute reversion, or as an immediate reversion, expectant on the death of the tenant for life, that which was intended to

⁽¹⁾ 4 L. T. (N. S.), 464.

⁽²⁾ 14 Ed. p., 244.

⁽³⁾ 2 H. & M., 354.

⁽⁴⁾ 1 Sm. & Giff., 529.

⁽⁵⁾ Law Rep., 2 Ch., 21.

be offered for sale, which was in truth an equity of redemption in a reversionary interest, which was itself a reversionary interest in an equity of redemption. Such a description, in my judgment, was calculated if not intended to entrap, was calculated if not intended to mislead persons who would thereby be entrapped into the auction room. A person reading such a description as this, who would be disposed to invest in such a property, would naturally first of all go and inquire what the value of the property was, and would naturally then apply to an actuary, or some other person whom he thought competent to give him advice upon such a subject, what was the proper deduction to be in respect of the outstanding life interest. If he had at the same time been informed that what he was buying was an equity of redemption a prudent man would consult with his solicitor, or some other person capable of advising him in such a matter, as to what were the exact rights and the exact liabilities which he was acquiring and taking upon himself as a purchaser of an equity of redemption.

There being, then, this improper and misleading description in the particulars of sale, I am of opinion that the burden of proof is cast entirely on the defendant to show that the plaintiff was not in fact misled by what he had read, and of that burden the defendant has not, in my judgment, discharged himself. It was not sufficient to read, in the midst of a long paper of conditions, a condition; not even the first, following immediately the particulars of sale, but the fourth condition, which merely told him that the property was subject to several mortgages, and which contained a very long story as to what he was to do; as to which it might very well happen, as in this case it did happen, that it failed to convey to the purchaser's [124] mind this information, which ought to have been conveyed to him, namely, that what he was buying was the right of instituting two or three suits in chancery, an immediate liability to a sum of £500, which he might be called upon to pay at any moment, and an immediate liability to one or two other chancery suits, which the mortgagees of the property might at any time have instituted for the purpose of foreclosure. I am of opinion, from all the circumstances of the case, and from the conduct of the purchaser, that he never did know what he was buying, and that he never had his mind sufficiently clear of that misrepresentation which was infused into it by the particulars of sale and in consequence of which he was led to bid as he did.

It is also suggested that he went on with the transaction for some days after he had bid, with some notice of what he done. In my opinion, when a man has been induced to sign a document under these circumstances, and has found himself entangled

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in the matter, he has a right to a reasonable time to ascertain his position, and to take advice from persons capable of advising him as to what he ought to do; and in this case the plaintiff seems to have acted with all reasonable promptitude in making his objection to the contract into which he had been induced to enter, and in repudiating that contract into which he had so entered.

It was very strongly impressed upon us that Lord St. Leonards, had said in his book ⁽¹⁾ that contracts for sale, although they might not be enforced in this court, could only be set aside on the ground of fraud. The word "fraud" there is *nomen generalissimum*, and it must not be construed so as to mislead persons into the notion that contracts for sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the court to deal with them as it deals with any other instrument or any other transactions, in which the court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. Indeed the books are full of cases in which the court has dealt with contracts of that kind — contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, contracts for the sale of shares ob-
[25] tained by directors through *misrepresentation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were willfully guilty of moral fraud in what they had done. A contract for sale, like every other contract, is subject to the ordinary rules and jurisdiction of this court, and that passage of Lord St. Leonards must be understood as meaning that the same kind of case must be made when a party comes here to set aside a contract for sale as must be made in setting aside any other contract or dealing between the parties.

In my opinion, therefore, the decree of the vice chancellor was right, and this appeal ought to be refused, and refused with costs.

SIR G. MELLISH, L.J. : I am of the same opinion.

Solicitors for the appellant : Messrs. *Iliffe, Russell, & Iliffe*.
Solicitors for the plaintiff : Messrs. *Cole, Cole, & Jackson*.

(1) Sugden's Vendor and Purchaser, 14th ed., p. 214.

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[Law Reports, 8 Chancery Appeals, 125.]

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CLOWES v. STAFFORDSHIRE POTTERIES WATERWORKS COMPANY.

[1870 C. 185.]

Injunction — Pollution of River — Abuse of Parliamentary Powers — Waterworks Act, 1847 (10 & 11 Vict. c. 17), s. 6.

A waterworks company were authorized by their private act to take and use the water of certain springs which supplied a river upon the banks of which certain mills were situate. The act provided that the company should not abstract more than a certain amount of water before they had constructed a compensation reservoir for storing the water during floods for the benefit of the millowners. The act gave the company compulsory powers for acquiring land, streams, and springs for their undertaking, and powers to acquire by consent lands for constructing their compensation reservoir. The act contained a reservation of the rights of the owners and occupiers of any lands, mills, or works, to the use of the waters of the stream, except so far as provided and declared by the act. The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), was incorporated with this act.

The company constructed a compensation reservoir, and a subsequent act of parliament which gave them further powers, including powers of emptying and cleansing the reservoir, recognized this reservoir as a sufficient compensation reservoir for the millowners, and directed it to be maintained.

The owner of some dye works situate on the river below the reservoir filed a bill against the company, complaining that the effect of the reservoir was to make the water of the river more muddy than it was before its construction, and to render it unfit for the process of dyeing, and praying for an injunction to restrain the defendants from fouling the stream. These allegations being in the judgment of the court established:

Held (reversing the decision of Malins, V.C.), that the acts gave the defendants no power to foul the water; that the compensation clauses in the Waterworks Act, 1847, did not apply, inasmuch as the injury was such as the company were not authorized to commit; and that the plaintiff was entitled to an injunction.

Quære, whether sect. 6 of the Waterworks Act, 1847, gives compensation for injuries to the lands of third persons caused by works on land which could be taken only by consent.

THIS was an appeal from a decree of Vice Chancellor Malins. The plaintiff, Ann Clowes, was the tenant for life of certain dye houses and premises situate in the town of Leek, in Staffordshire, on the bank of the river Churnet, which were leased to Messrs. Hammersley at a rent of £120 a year.

The premises had been used for more than one hundred years for washing and dyeing silk, and the plaintiff alleged that for this purpose great purity and softness in the water was requisite.

The Staffordshire Potteries Waterworks Company was incorporated by the 10 & 11 Vict. c. cciv. for the purpose of taking water from certain springs, called the Seners springs, for supplying the inhabitants of the pottery towns near Leek with pure water. These streams previously fed the river Churnet, and the abstraction of the water from them diminished the

supply of water in the river to the detriment of the millowners on its banks. Accordingly the company constructed a compensation reservoir at Deep Hays, a little below the plaintiff's works, but that proving insufficient, a fresh application was made to parliament.

By the Staffordshire Potteries Waterworks Act, 1853 (16 & 17 Vict. c. cxviii.), with which the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), and the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), were incorporated, the company established by the previous act was dissolved, and a new company was incorporated under the same name with additional powers. The 26th section of that act was as follows:

127] **"It shall be lawful for the company, subject to the provisions of this act, to make and maintain the said works hereby authorized, in the line and according to the levels defined on the sections, and upon the lands delineated on the said plans and described in the said book of reference, and to enter upon, take, and use such of the lands, streams, and waters mentioned in the said plans and book of reference as shall be necessary for that purpose: provided that the maximum quantity of water to be abstracted by the company for the purpose of the said undertaking shall not exceed 1,500,000 imperial gallons in a day of twenty-four hours, until an additional compensation reservoir or additional compensation reservoirs shall have been made, completed, and certified, as hereinafter mentioned."* The 54th section enacted, "that before the company shall abstract or take from the said springs or streams, or from any other sources or tributary streams of the river Churnet a greater quantity of water than 1,500,000 imperial gallons in any one day, the company shall and are hereby required within four years from the passing of this act to construct for the use and benefit of the owners and occupiers of the said mills such additional compensation reservoir or reservoirs, with proper embankments, waste-weirs, watercourses, discharge-pipes, gauges, and other works, as shall, together with the existing reservoirs at Deep Hays valley, be capable of constantly discharging into the said river Churnet such quantity of water as shall be equal to the maximum quantity of water required to be taken by the company exclusive of the ordinary flow of the Deep Hays stream, and of the stream or streams on which the additional reservoir or reservoirs shall be constructed, and which additional reservoir or reservoirs shall, as to the capacity and sufficiency thereof, be made and completed to the satisfaction of an engineer, to be appointed by the owners and occupiers of the said mills, as hereinafter mentioned, who upon the completion thereof to his satisfaction shall give a certificate in writing of such completion."

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The 62d section gave power to the company, for the purpose of constructing such additional compensation reservoir or reservoirs, and the works connected therewith, to purchase and acquire, with the consent of the owners and occupiers thereof, any land which might be necessary, not exceeding eighty acres, in addition to the *lands authorized to be acquired by the [128 act, or by the acts incorporated therewith.

The 66th section enacted that the company should make good to the owners and occupiers of the several mills and manufactories for the time being situated upon or contiguous to the river Churnet, and to the owners or occupiers of any other buildings, lands, or grounds, and to all other premises, all damage and injury, as well immediate as consequential, which they might sustain "by reason or in consequence of the bursting, leaking, failure, or insufficiency" of any reservoirs or other works then or thereafter to be constructed by the company under the authority of the act.

The 72d section was as follows: "That nothing in this act contained shall be construed to affect, diminish, abridge, prejudice, or alter, in any manner whatsoever, any right which, before the passing of this act, the owners, lessees, or occupiers of any lands, canals, mills, or works, or of any of the springs or streams authorized to be taken or used for the purposes of this act, had or have possessed or enjoyed, or might lawfully have, possess, or enjoy, to the use of the waters of the said springs or streams, or of the tributary waters, springs, or streams flowing into the same, except so far as is provided and declared in and by this act."

In pursuance of this act the company constructed the Tittesworth reservoir, which was situate about a mile and a half above the plaintiff's works, for damming up and storing the flood-water of the Churnet.

In 1861 the company obtained a fresh act (the 24 & 25 Vict. c. cxlvi.), by which powers were given them to take fresh springs and streams for the purpose of their undertaking, and to construct fresh works.

The 27th section of that act enacted that "the present Deep Hays and Tittesworth reservoirs shall, from and after the passing of this act, be compensation reservoirs, and the same, and the guages and other works connected with the same respectively shall for ever be maintained by the company for the protection and benefit of the owners of the navigation from the Trent to the Mersey, and the owners and occupiers from time to time of the Churnet Mills," and certain other mills therein specified.

*The 34th section provided that the company might [129 draw and let off the water of either of the compensation reservoirs as often as it should be requisite, for the purpose of re

pairing or cleansing the same, or any part thereof, or for any other necessary purpose, the company thereby doing as little damage as possible.

The Tittesworth reservoir extended over an area of about forty acres, and was from thirty to forty feet deep. The stream of the Churnet flowed into it at the upper end, and was discharged at the lower end by a series of pipes. The plaintiff complained that, whereas before the construction of this reservoir the water of the Churnet was quite pure, except for two or three days after a flood, since its construction the water continued in a muddy state for ten or fourteen days after a flood, and was often on the eighth or tenth day after more impure than on any of the days preceding.

The result was, as stated by the plaintiff, that the plaintiff's tenants had been unable to dye the silk sent to them by manufacturers with the same brilliant colors as before the construction of the reservoir, and had lost some of their customers in consequence. They therefore threatened to give up the works, and the plaintiff's interest in the property was thereby seriously diminished. Under these circumstances the plaintiff filed the present bill against the company, praying that they might be restrained from fouling the water in the Churnet, and that they might be ordered to restore the water to the same condition as it was in before the construction of the Tittesworth reservoir.

The increased impurity of the stream was clearly proved by the plaintiff's evidence, and was, in fact, admitted by the defendants; and it appeared that they had put up a filter for Messrs. Hammersley, and that other plans had been suggested by their engineer for mitigating the evil, but they denied that the plaintiff's interest in the property had been materially affected; and they submitted that the reservoir had been constructed under the powers of their acts of parliament, and that if the plaintiff had any ground of complaint, her remedy was not by suit in equity, but under the statutes.

The vice-chancellor dismissed the bill with costs, and from this decree the plaintiff appealed ⁽¹⁾.

(1) 1872. May 29. SIR R. MALINS, V.C., after referring to the facts of the case, continued: It is admitted on the part of the plaintiff that the reservoir, the work of the defendants, was finished in the year 1857, in compliance with the act of parliament; that the water flowed into it and flowed out of it as the act of parliament required it should do; and the plaintiff does not set up any claim against the defendants for improper construction of their works. Therefore it is a case in which there is no violation of the parlia-

mentary powers by the defendants. They have constructed a reservoir, and they continue to use that reservoir. Now what must be the inevitable effect of a river of this size? for it has been stated that the width of the river is forty feet; the depth of it is variable, according to the state of the weather; it is deeper in winter than in summer, but the average width seems to be about forty feet, and the depth from four to six feet. What must be the inevitable consequence of such a river as that flowing into a reser-

*Mr. Pearson, Q.C., and Mr. Cookson, for the plaintiff: [130
The injury to the plaintiff is clearly proved; but it is not of such

voir and flowing out again? Can any one fail to see that there must be a deposit—call it mud, or whatever it may be—in that reservoir? When it falls to the bottom it becomes mud. It is as certain as that the river flows into the reservoir and then flows out again, that it must and will leave a deposit. That, therefore, is the necessary consequence of the construction of the works. The plaintiff not finding any fault with the construction of the works, so on the other hand the defendants do not deny that the consequence of the construction of the works has been to inflict on the tenants of the plaintiff some injury. The extent of the injury is very much in question. As in other questions of this kind, there is the usual quantity of contradictory evidence. The plaintiff's witnesses say it has been very serious, particularly Messrs. Hammersley, who are not plaintiffs in this suit, and whose interests, therefore, I cannot regard. They have failed to come forward as plaintiffs; they must have some very strong reasons for it, because, if there be an injury here it is perfectly plain that the injury to Miss Clowes, as the owner of this mill, is utterly insignificant as compared with the injury which Messrs. Hammersley must have sustained; but they file no bill. Undoubtedly, they appear as witnesses in favor of the plaintiff. The defendants do not deny, as I have said, that they inflict some injury upon Messrs. Hammersley and, it may be, in consequence of the injury Messrs. Hammersley have sustained, on the plaintiff also. Now what is this injury? Assuming the case of the plaintiff to be thoroughly established, that she does not only sustain, as the defendants admit she does, some injury, but that she sustains such an extent of injury as is described by her witnesses, what is the result of it? What is the injury, and what is the measure of the damage which she sustains? She is the freeholder of this mill, and Messrs. Hammersley are her tenants under a lease dated the 18th of November, 1859, at a rent of £120 a year. Now what is the injury she sustains? If she gets her rent from the mill she is not injured at all. It is not suggested that she has not got her rent, or that in any one year there has been a cessation of payment,

or that there is likely to be. It is very true that Messrs. Hammersley have always been grumbling against the company and against their landlord; they have been threatening for years to leave, but they never have left, and I am perfectly satisfied they have not the slightest intention of leaving. I am also satisfied that if they were to leave, the statement in the defendant's evidence that the works could be relet, is perfectly correct.

Sitting here, and having heard all the parties with all the contradictory evidence, with which, in this case, as in every other case, a judge in equity has to deal, and forming the best conclusion I can, I come, without the slightest doubt in my own mind, to the conclusion that the injury to Miss Clowes is almost an imaginary injury. If there be an injury to the Hammersleys, the tenants, they do not come forward to seek any remedy for it; and, looking at all the circumstances, I say I am satisfied that the injury to Miss Clowes is almost nominal. Now, I do not at present advert to the question whether there is a remedy at law or in equity, or whether the remedy is under the act of parliament. I assume on this part of the case that it is a case in which Miss Clowes does sustain some injury, and is entitled to some compensation. I am asked to grant an injunction. I pressed Mr. Pearson very much to tell me what kind of injunction I ought to grant. First of all let us look at the principle of it. I put the question to Mr. Pearson whether he did not admit that if he could sustain a bill in equity he could also maintain an action at law. Of course he was bound to admit that. In the case which he very much relied on, *Broadbent v. Imperial Gas Company* (7 D. M. & G., 436), this court interfered because, as Lord Campbell points out, the award of the arbitrator in that case was equivalent to a judgment at law; and because an action had been maintained at law the court of equity interfered. If this lady, therefore, is entitled to maintain a suit in this court, she is certainly entitled to maintain an action at law for the injury she has sustained. Therefore she can only succeed here because she can succeed at law. Mr. Pearson says if I send her to law she must bring ac-

a nature that she can obtain adequate damages at law with-
[131] out *bringing successive actions, and she is therefore en-

tions from time to time as often as a flood occurs — a fresh action every year. I do not at all agree with that view of the case. It is perfectly plain, from the admissions on both sides in this case, that the proper remedy here would be the construction of a filter. The tenants of the plaintiff were offered a filter. They never would say they would be satisfied with it. On the whole evidence I am satisfied that if they had said once for all, "We will take a filter in perfect satisfaction of all demands; make a filter for us, and we will never make another demand against you," a filter would have been constructed. I have before me the evidence. Now the damage which has been sustained in this case is not the damage of the plaintiff, but of Messrs. Hammersley, whose suit I must regard this as virtually being. As regards Miss Clowes, if she has sustained damage, there is an adequate remedy for it at law, and by an action at law she can recover all that she can be possibly entitled to, namely, the expense of the construction of a filter, that being, according to my view, the utmost measure of injury that she has sustained. Then, if there be an adequate remedy at law, ought I, by injunction, to interfere? Now, it is not a trifling thing to grant an injunction of this kind against a company who have spent large sums of money in the construction of such a work as this reservoir. If I were to grant the injunction asked for there would be a motion to commit; but as to any tribunal deciding whether the injunction had been obeyed, or whether there had been a breach of it, I think it would be utterly impossible to do so. Mr. Pearson has not pointed out to me any one thing which the company ought to do, except that they are to cleanse out this reservoir. To cleanse a reservoir with an area of forty or fifty acres, and forty feet deep! Why, they must run off the water and make a railway. Every one knows what was done in cleaning out the Serpentine, which was a work of the same kind, and which cost at least £20,000. I have no doubt that the clearing out of this reservoir would cost £10,000 or £20,000. It is gravely suggested that for such an injury as this that is what this company ought to do.

I understood the plaintiff to say that it should be done after every heavy shower, after every storm. Such a thing would be utterly absurd. The natural consequence is that there must be a deposit of mud. The plaintiff was bound to know that after this reservoir was constructed there would be a deposit, and that the water supplied would run over that deposit, and might be less clear than it had theretofore been. Now, therefore, on these grounds, independently of the act of parliament, I come to the conclusion that, although I am satisfied that, as the defendants admit, the plaintiff has sustained some injury, that is, her tenants have, and she through them, yet as far as the injury to the plaintiff is concerned, I am very much inclined to think that a very small amount would fully compensate her for the injury. With regard to the plaintiff's tenants, I am satisfied that the expense of constructing a filter would be the measure of the damage; and under all those circumstances, independently of other considerations applicable to the case, I should come to the conclusion, from my own decision in the case of *Attorney General v. Gee* (Law Rep., 10 Eq., 181), with regard to the drainage of the town of Bishop Stortford, that the same principles upon which I acted in that case I am bound to act upon here. It is not a case for an injunction in this court, and I am bound to leave the plaintiff to her remedy at law to recover such damages as she has sustained. To grant an injunction, the working of which it is impossible to foresee, obedience to which I am unable to see the way to, would, I think, be doing an act of the grossest injustice; and on that account I come to the conclusion that the plaintiff has failed to support the case she has brought forward.

Then the defendants take another objection, and, to my mind, an insuperable objection. They say the plaintiff admits, as I have already pointed out, that the reservoir was duly constructed in pursuance of the act of parliament. They refer for that purpose to the company's Amendment Act of 1861, by which they were empowered to enlarge the Tittesworth reservoir. Mr. Pearson says they are not entitled to refer to

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titled to an injunction in this court: *Isenberg v. East India House Estate Company* (¹).

that act, because it is not mentioned in the answer, and for that purpose he appeals to a decision in a case in which he and I were counsel some years ago, namely, *Phillips v. Phillips*, in which the purchase for a valuable consideration was not mentioned in the answer, but was set up by affidavit, and it was there decided that it being set up by affidavit was not sufficient, and that the plea was unavailable. He says it is not mentioned here in the answer, and therefore cannot be set up by affidavit.

Fortunately for the defendants, it is totally unnecessary for them to have recourse to the act at all, because the plaintiff's admission is, that in 1857 the reservoir was properly constructed in compliance with the act of parliament; therefore they do not want the help of the act of 1861 at all. Then, if the reservoir was constructed in pursuance of the act of parliament, what are the principles of law applicable to the case? I take it that the law is now thoroughly settled, that whenever an act is a consequence of what is done in pursuance of parliamentary authority, the remedy is not by action at law or by injunction in equity, but is under the provisions given by the act of parliament. Now this cannot be better expressed, I think, than it is expressed in the two authorities to which I have referred. First, I will take the rule laid down by Lord Cairns in *Hammersmith and City Railway Company v. Brand* (Law Rep., 4 H. L. 171) before the house of lords. The question — on which there was much difference of judicial opinion — there was, whether, when a railway had been constructed, and the working of the railway caused vibration in an adjoining house, the owner was entitled to damages for the destruction of his property by the vibration which rendered it uninhabitable? The majority of the noble lords, as the court below had decided, were of opinion that he was not entitled to any compensation. Lord Cairns took a different view, and thought that he was entitled to compensation; therefore there was a difference of opinion as to whether he was entitled to compensation or not. But there was no difference of opinion upon one point. They all agreed upon

this, that if he was entitled to compensation, his remedy was not by action at law, or by bill in equity, but under the particular powers given by the act of parliament. Lord Cairns said: "On one part of the case I do entirely concur with them. It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landlord against the railway company for damage that the landlord has sustained. It must be taken, I think, from the statements in the case, that the railway could not be used for the purposes for which it was intended without vibration. It is clear to demonstration that the intention of parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought and had succeeded, the Court of Chancery would interfere by injunction, and would prevent the railway being worked, which is, of course, a *reductio ad absurdum*, and would defeat the intention of the legislature. I have therefore no hesitation in arriving at the conclusion that no action would be maintainable against the railway company." Now this is peculiarly applicable to the present case, because Lord Cairns there says, "If therefore it could not be used without vibration, and vibration necessarily caused damage to the adjacent landowner." So I say here. The reservoir never could be used without causing to a certain extent a thickening of the water. The water becoming more muddy is a necessary consequence of the construction of the works, and the remedy must be found therefore not by action at law, but under the act of parliament. The same rule is in very distinct terms stated by Mr. Justice Blackburn, who gave the unanimous opinion of the judges, in advising the house of lords in the case of the *Mersey Docks and Harbor Board Trustees v. Gibbs* (Law

(¹) 33 L. J. (Ch.), 392

132] *The defendants contend that the injury the plaintiff has sustained is the necessary result of the construction of the reser-

Rep., 1 H. L., 93), in the following passage: "Another class of cases also cited depends upon the following principle: If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case whether the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their acts; though the one road is made for the profit of the shareholders in the company, and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature." That applies to the present case. This act is not wrongful, because it is authorized by the legislature; therefore you seek a remedy in the manner in which the legislature has given it to you. Now then, how has the legislature in this case given the remedy? I have been referred to the Waterworks Clauses Act (10 & 11 Vict. c. 17), s. 6, which I need not read, but the general effect of it is to make the company liable for any damage occasioned to other persons by the construction or maintenance of the works. Here the damage is caused by the maintenance of the works; day by day, as the company maintain the works, this injury, such as it is, is produced. Then they are bound to make compensation to all persons whose property is injuriously affected by the construction or maintenance of the works. How is that remedy to be enforced? The act says it shall be enforced under the Lands Clauses Act. Sect. 68 provides for all these cases; therefore the remedy is given under the act of parliament.

You are to proceed under the 68th sec-

tion of the Lands Clauses Act, to which this section expressly refers. And how is that to be done? Why, the person who considers himself injuriously affected can make a claim upon the company. He can require it to be referred to arbitration, because the option of arbitration or action is with him, not with the company. He can oblige them to go to arbitration; or, if he does not require arbitration, he can fix an amount of damages, which throws upon the company the obligation to summon a jury within twenty-one days, or, in default of doing so, they are liable to pay the full amount claimed. Applying that to the present case, this lady says she has sustained damage. What is the amount of it? Her life estate in the property is capable of valuation. Suppose it rendered her property untenable, the amount of the damage would be the value of her life estate in this property, £120 a year. She would say, "I have lost my tenants; they have gone, and I cannot find another; my life interest produces me £120 a year, and £120 a year for my life is worth so much money, and that is the extent of my damage." She could oblige the company to go to arbitration upon that, or she could assess the amount, and require them to summon a jury, or they would be liable to pay the whole amount. Or she might put it in another way: "I have sustained so much injury, my tenants will not remain unless a filter is constructed; they will not construct it for themselves; I must either lose my tenants or construct a filter; to construct a filter would cost £400 or £500; I am about to construct it; my tenants will not pay for it; I require you to pay for it; that is the measure of my damage." I can see no reason whatever why that course should not have been adopted. Now, in opposition to these views, two cases were mainly relied upon, on one of which Mr. Cotton replied, but, with the exception of those two cases, I think I may say the cases on the subject are not only apparently but actually in conformity. I need not refer to the case which was cited in argument by Mr. Cotton, namely, *Hutton v. London and South Western Railway Company* (7 Hare, 259), because all that that decides is that where conse-

voir, and that as the reservoir had been constructed under the acts of *parliament, she either has no remedy at all, or her re- [133
 medy is under the compensation clauses of the acts. But, in
 the first place, the fouling of the water does not necessarily arise
 from the *maintenance of the reservoir. The evil might [134
 be remedied either by cleansing the reservoir, for which the
 company have special powers under the 34th section of the act
 of 1861, or by *constructing filters, or by a different [135
 system of pipes by which the water might be drawn from the
 reservoir at a higher level. But it is no concern of the plaintiff's
 to suggest a remedy; it is for *the defendants to find the [136
 best way of obeying the injunction: *Attorney General v. Colney
 Hatch Lunatic Asylum* (1). In the second place, the lands for
 the reservoir were not authorized to be taken under compulsory
 powers, and, therefore, the compensation clause (sect. 6) of the
 Waterworks Act, 1847 (2), to which we are referred *has [137

quential damages are to be paid for injuriously affecting the property, it is not necessary for the landowner to be paid for them before the construction of the works. That was the contention of Mr. Pearson, that the extent of the injury could not be ascertained until the works were actually constructed; but there are two authorities which are apparently in favor of Mr. Pearson's views; first, the case of *Lawrence v. Great Northern Railway Company* (18 Q. B. 643), until you examine the principle, does appear to militate against the other authorities I have cited; but, upon looking closely into the case, you find that the action was there maintainable because the company had not properly exercised their parliamentary powers. If they had properly exercised their parliamentary powers, the result must have been the same. The remedy was not at law, but under the Lands Clauses Act for the consequential damages. It proceeded, therefore, entirely on the ground which is taken away in this case, where it is admitted that the works are properly constructed, viz. that the works there were improperly constructed. So in the other case of *Broadbent v. Imperial Gas Company*, the decision was based on the ground that there was no authority by the act of parliament to make gas in a particular manner; the company were authorized to construct gas works, but the mode of making gas was at their own peril, and as they adopted a deleterious mode of making gas, when they could make it without such a process,

the court very properly interfered, and an action being maintained, an injunction was also granted, because that was an injunction capable of being obeyed. Therefore I come to the conclusion, first, on the ground that the plaintiff has not sustained such an amount of damage as will entitle her to the interference of the court, that the bill must be dismissed. I come to that conclusion also on the ground that, if she has sustained any damage, it is capable of compensation by an action at law, if it had not been for the other objection which applies to her case. I further come to the conclusion that whatever damage she or her tenants sustain in this case, is in consequence of the property being injuriously affected under the act of parliament. It arises purely in consequence of the construction of the works in accordance with the act of parliament, and, being in consequence of the exercise of parliamentary powers by the erection of parliamentary works, the remedy must be sought, not by an action at law, or by a bill in this court, but by that mode of proceeding under the 68th section of the Lands Clauses Act, which is applicable to all such cases. On all these grounds, therefore, I am of opinion that this bill must be dismissed with costs.

(1) Law Rep. 4 Ch., 146.

(2) 10 & 11 Vict. c. 17, s. 6: "Where by the special act the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams other

no application. The compulsory powers only extended to taking water from the springs and streams, and the works necessary for that purpose; they had power to diminish the flow of water, but they had no power to foul the stream, and, so far as they are doing so, they were acting *ultra vires*, and are liable to an injunction: *Broadbent v. Imperial Gas Company* ⁽¹⁾.

[They also referred to *Attorney-General v. Gee* ⁽²⁾ and *Crossley v. Lightowler* ⁽³⁾.]

Mr. Cotton, Q.C., and Mr. Speed, for the defendants: The damage complained of is no injury to the plaintiff. The works are let to a tenant who pays his rent regularly, and there is no proof that if he leaves the property it might not be let to another tenant. If any real injury is done by the reservoir, the plaintiff can recover adequate damages at law. The fouling of the water is a necessary consequence of the construction of the reservoir. The plans suggested by the plaintiff for drawing off the water would make the deposit of mud greater, and the reservoir would soon become filled up; and if it were repeatedly cleansed the benefit of storing the water would be lost, and, besides, the expense to the company would be ruinous.

If the plaintiff is entitled to any relief, it must be obtained as compensation under the 6th section of the Waterworks Act, 1847; that section is not confined to the injury to persons whose land is taken under the compulsory powers of the special act, but extends to all injury done under the powers of the act: *East and West India Docks Company v. Gattke* ⁽⁴⁾, which must be taken to have overruled *London and North Western Railway Com-*

wise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this act; and if the waterworks be situated in England or Ireland, to the provisions and restrictions contained in the lands Clauses Consolidation Act, 1845; and if the waterworks be situated in Scotland, to the provisions and restrictions contained in the Lands Clauses Consolidation (Scotland) Act, 1845, and shall make to the owners and occupiers of and all other parties interested in any lands or streams taken or used for the purposes of the special act, or injuriously affected by the construction or maintenance of the works thereby authorized, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sus-

tained by such owners, occupiers, and other persons, by reason of the exercise as to such lands and streams of the powers vested in the undertakers by this or the special act, or any act incorporated therewith, and except where otherwise provided by this or the special act, the amount of such compensation shall be determined in the manner provided by the said Lands Clauses Consolidation Acts respectively, for determining questions of compensation with regard to lands purchased or taken under the provisions thereof, and all the provisions of the said last mentioned acts respectively shall be applicable to determine the amount of any such compensation, and to enforce payment or other satisfaction thereof.

⁽¹⁾ 7 D. M. & G., 436.

⁽²⁾ Law Rep., 10 Eq., 181.

⁽³⁾ *Ibid.*, 2 Ch., 478.

⁽⁴⁾ 3 Mac. & G., 155.

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pany v. Smith (¹). Although the Tittesworth reservoir [138 was not originally constructed under the compulsory powers of the act of 1853, it has been recognized as a complete reservoir by the act of 1861, and the plaintiffs cannot now complain of its construction or maintenance being *ultra vires*.

SIR G. MELLISH, L.J. : The plaintiff in this case is the tenant for life of certain dyeing mills situate on the river Churnet, and the suit is brought to restrain the defendants, the Staffordshire Potteries Waterworks Company, from fouling the stream, which fouling is said to be injurious to the plaintiff in respect of the dye works.

The general case made by the bill is this : It is admitted that before the defendant's reservoir was made the river Churnet did not always send down water sufficiently pure for the dye works, and that from time to time there were floods in the stream, and that when a flood occurred it usually took two or three days before the water became pure, but the complaint is, and it appears to me to be proved by a considerable body of evidence, that the result and effect of making the reservoir in the way in which it has been made, and the user of it in the way in which it has been used, is that the water, which used only to be disturbed for two or three days, is now, in the case of a flood, disturbed for a very much longer time, and also that at other times when there has been no rain or flood at all, if the reservoir is low, the water comes down in a muddy condition, so as seriously to affect the plaintiff's works. The vice-chancellor has dismissed the bill upon two grounds. First, he has come to the conclusion that the complaint is a frivolous one, and that the damage is not sufficient to entitle the plaintiff to maintain a suit in this court; secondly, he is of opinion that the remedy, if any, is not by action or by suit, but under the compensation clauses of the Waterworks Clauses Act, 1847.

I think it would be better that I should take what the vice-chancellor treated in his judgment as the second point first, and consider whether the remedy in this case is by action at law, or whether it is under the compensation clauses.

*In the first place, if this reservoir had been made with- [139 out the authority of an act of parliament, and the effect of it had been such as it is proved in this case to be, there can of course be no doubt at all that the occupier, at any rate, of the mill, would have been entitled to maintain an action at law on account of the fouling of the stream. Nor, as I understand, is that disputed by the defendants. That being so, of course the right to maintain that action at law must still continue, unless

(¹) 1 Mac & G., 216.

it has been taken away by the acts of parliament, and the burden of showing that it has been taken away by the acts of parliament, beyond all question, is upon the defendants; because if a public company or any individuals obtain an act of parliament which they say enables them to take away the common law rights of any person, they are bound to show that it does it with sufficient clearness.

The question, therefore, is whether, according to the true construction of the two acts of parliament of 1853 and 1861, taken together, the right to foul the water is given to the defendants. By the 26th section of the act of 1853, there is a general power given to make a compensation reservoir. [His lordship read the section, and continued:] Now it is to be observed that under that section this reservoir is not made for the purpose of supplying water to be used in the town, but it is a condition precedent to the company being entitled to take the waters of the different streams. If they do not or cannot make the reservoir, the simply consequence is that then they cannot take the water beyond the limited quantity which is mentioned in this section. It is also to be observed that, although to a certain extent compulsory powers are given and lands are delineated on the plans which they are entitled compulsorily to affect, yet they are not given any compulsory power for the purchasing of lands for this reservoir. If it had so happened that no owner of lands on the stream was willing to sell them the land, they could not have made the reservoir at all, and the simple consequence then would have been that they would not have been entitled to take the additional quantity of water. If the question had depended solely on that section, it would have been extremely doubtful indeed whether any compulsory powers with reference to the reservoir were given at all. If no compulsory powers were given for the purpose of purchasing [140] lands upon *which the works were to be built, it certainly seems extraordinary that compulsory powers should be given to take away the rights of other persons who have rights in the nature of easements over that land which they so purchased.

But the case does not end simply with that section. The next section which is material is the 54th, which is a little more than a repetition of what is said in the 26th, as to the making of the reservoir, and simply carries out the provisions of that section.

But the 72d section appears to me very material in the determination of this question. [His lordship read the section.]

Now the plaintiff, and the others owners of these mills, and the occupiers of these mills beyond all question, did enjoy, before the passing of this act, the right of using the water of

the Churnet in its natural purity for the purpose of dyeing. Then does not this section preserve it? It appears to me that, beyond all question, it does. What is the objection of inserting such a section as this? It was said that it means nothing, that it simply reserves what would have been implied even if it had not been there, and possibly to a great extent that may be true. I am not at all certain that even if this section had not been there the construction would not have been the same. But the section is put in to obviate all doubt. If it had not been inserted, the question might possibly have been raised whether the rights of persons were not incidentally affected, and to save that doubt, and prevent any persons who might be afraid that their rights might incidentally be affected endeavoring to obtain express clauses for their protection, this general clause is inserted.

The scheme of the act appears to me to be simply this: the waters of the streams are to be taken, and, therefore, it necessarily follows that they will be greatly diminished in quantity. Therefore, the millowners who used the stream for power, and are interested in the quantity of water which comes down the stream, are to be compensated in kind. But as respects any other person who may have an interest in the stream, any riparian proprietor or other person who may use the water, who may be interested in its purity, because he uses it for manufacturing purposes, the promoters of this scheme undertake that they will not affect their rights at all. That appears to me to be the bargain upon which this act of parliament was [141] obtained, and, in my opinion, the courts ought to hold persons to these bargains, because otherwise a clause of this kind would deceive those who were interested. Suppose that in this act they had expressly inserted a clause to the effect that the company should be at liberty to foul the water as much as they might find it convenient for the purpose of making and working their reservoir, would not the plaintiff and the owners of the mills, if they had heard that such a clause was to be inserted in the act of parliament, have applied directly to parliament, and would not, as a matter of course, a clause have been inserted for their protection? For it is not the ordinary practice of parliament to take away water rights, except in cases of extreme necessity. The ordinary practice when such acts are obtained is to compensate those who are injured in kind. It is very difficult to compensate them in money, and parliament does not intend to destroy the manufacturing value of streams. Therefore clauses are introduced to preserve general rights of this character, which engineers seem to have, generally speaking, not much difficulty in enabling them to do. That appears, therefore, to me to be the scheme of this act of parliament.

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Then with respect to the act of 1861 : It was contended that, whatever might be the effect of the act of 1853, the act of 1861 recognized the reservoir as a complete reservoir, which had been properly made, and therefore no person after that act can legally assert that there is any imperfection in the making, or indeed, as it is contended, in the working of the reservoir. I am of opinion that the act of 1861 had not that effect. The object of it was simply to regulate the rights between the mill-owners and the company, and the effect of the clause, as it appears to me, simply is, that it is a legislative recognition that the reservoir is a sufficient compliance with the obligations which the previous act had put upon the company, as between them and the millowners, for the purpose of furnishing the quantity of water which was necessary for their purposes. [His lordship then referred to the sections of the act before stated, and continued:] The act contemplates that the reservoir will from time to time require to be emptied and cleansed. There are two reservoirs, and they are not to empty both at the same [42] time; and there are powers given *to them which appear to me to be to a considerable extent a recognition that they never contemplated that the water was to be as dirty as they chose to make it. Therefore I am of opinion that it would be wrong to construe this act of 1861 as effecting what certainly the committee, when they passed it, never supposed it would do, namely, to take away the rights of persons which had been preserved by the previous act.

The result is that these acts of parliament did not give the defendants any right to foul the water so as to be injurious to the plaintiff; and, consequently, an action at law would have been maintainable.

Then comes the only other question, which I will deal with shortly. I cannot conceive that, an action at law being maintainable, relief is not to be had in this court. If this case had happened before Sir John Rolt's Act or Lord Cairns' Act, I presume the ordinary course would be that a bill having been filed, an action would have been sent to be tried at law. The action having been tried, nominal damages would have been obtained, and the plaintiff would have come back to this court for an injunction. Would this court have sent her away, and said that she should bring action after action, instead of having her remedy by injunction? I cannot think that would have been so. The vice chancellor said, "If you can recover at law at all I think you will get no greater damages than would be sufficient to pay for a filter, and that would be a sufficient compensation." But, with submission to the vice chancellor, I do not think the plaintiff would get at law a sum sufficient to put up

a filter. She would only get, in the first instance, nominal damages, because in a case of this sort you cannot prove specific damage, and there is no evidence here of specific damage, and upon that evidence you would only get, in the first instance, 40s. damages. Then you must bring a second action, and what you would get in the second action would be the actual damage which you had proved you sustained between the time you brought the first and the second actions. Then you would bring a third action, and you would get as damages the actual damage which you could prove you had sustained between the time of bringing the second and third actions. It is because it is most inconvenient to leave the rights of parties to be determined in that way, and in fact impossible to leave it [143 in that way, that this court has always in such cases given relief. In my opinion, therefore, the plaintiff is entitled to maintain this suit, and is entitled to have a declaration that the acts of parliament have not given the defendants any legal right to foul the water, to her damage, and ought to have an injunction to prevent any such damage in future.

SIR W. M. JAMES, L.J. : I entirely concur in the view which has been expressed by the lord justice as to the legal construction of the acts of parliament, and as to the legal right of the plaintiff and the legal liability of the defendant. That being so, and the legal right being, as it seems to me, quite clear, the only question is, whether it is of such a character as to induce this court to grant an injunction. I am of opinion that this is a case pre-eminently for an application to this court for an injunction, upon two grounds. To one of these the lord justice referred — the absolute necessity of preventing a continued series of actions, which would be the sole result if we remitted the party to what used to be called the other side of Westminster hall. Beyond that, it has always been the practice of this court, and one of the main duties of this court, to take care that public bodies who obtain authorities under acts of parliament do not abuse their powers. The vice chancellor, indeed, expressed an opinion that this was a trivial damage, and that the courts ought not to encourage such cases to be brought before them. I myself should be very loth indeed to encourage parties to come here upon a mere technical legal right, but it is impossible, as it seems to me, to read what has taken place between these parties without seeing that there has been a very substantial ground of complaint in fact; and that the defendants and their agents (of course not admitting their legal liability) have admitted this by the very proper and laudable efforts made by them in past years to mitigate or avoid the damage com-

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plained of. After that, it seems to me, with all deference to the vice chancellor, impossible to hold that this is a case of a person who merely comes into this court for the purpose of vexation and oppression, availing himself of some technical [144] right which he has under an act of parliament. That *being so, I am of opinion that the injunction is really a matter of course, and I propose, if the lord justice agrees with me, to declare (following out the judgment he has been good enough to pronounce as to the legal construction) that the provisions of the act of parliament mentioned in the pleadings for storing and discharging the water in and from the reservoir of the defendants, did not legalize the fouling of the stream below the reservoir. Then an injunction restraining the defendants from so storing and discharging the water as to foul the water to the damage and injury of the owners and occupiers of the plaintiff's dye works in the bill mentioned.

Solicitors for the plaintiff: Messrs. *Milne, Riddle, & Mellor*, agents for Messrs. *Hacker, & Allen, Leek*.

Solicitor for the defendants: Mr. *J. Raw*, agent for Mr. *Llewellyn, Tunstall*.

[Law Reports, 8 Chancery Appeals, 144.]

L. JJ. Nov. 21, 1872.

Ex parte WARD. *In re* COUSTON.

Bankruptcy — Order and Disposition — Consent of True Owner — Bonded Warehouse.

In December, 1870, W. bought from C. whisky in bond, to remain in bond to C.'s order rent free for twelve months, after which warehouse rent to be paid. In March, 1871, the price was paid. On the 19th of February, 1872, W. wrote to C. directing him to forward a specified hogshead of the whisky, and inclosing a check of sufficient amount to pay duty and clear the whisky. On the 26th C. filed a petition for liquidation, having retained the check, but not paid the duty nor in any way complied with W.'s directions. At the time of sale the whisky had been all carried to W.'s credit in C.'s books, but had throughout been lying to C.'s order at a dock warehouse:

Held (reversing the decision of the chief judge and affirming that of the county court judge), that this hogshead did not pass to the trustee in liquidation as being within C.'s order and disposition, as the consent of the true owner had been determined by the demand of possession, though no notice had been given to the warehouseman.

THIS was an appeal from a decision of the chief judge, reversing part of an order of the judge of the County Court of Lancashire.

In December, 1870, Couston, Thomson, & Co., spirit merchants, carrying on business at Leith and Liverpool, sold to Robert Ward, an innkeeper at Manchester, ten hogsheads of Isla whisky,

*numbered 4098 to 4107, which were then in bond at the [145 Leith dock warehouse to the order of Couston, Thomson & Co. At the time of the sale it was agreed that the hogsheads should remain in bond under Couston & Thomson's control rent free for twelve months, after which warehouse rent should be payable by the purchaser. In March, 1871, Ward paid £77 2s. 9d., the price of the whisky. In November, 1871, Ward died, and his business was continued by John and James Ward, his executors. On the 19th of February, 1872, Couston & Co. received from the Wards a check for £30, accompanied by the following letter: "Inclosed you have check for £30 on account of one hogshead of whisky, number 4100. Direct and permit for the executors of Robert Ward, Town Hall Tavern, Salford." The £30 was to pay duty, warehouse rent, and clearing charges in respect of the one hogshead, and was more than sufficient for the purpose. On the 26th of February, 1872, Couston, Thomson, & Co. filed a petition for liquidation by arrangement, and on the 25th of March, a meeting of creditors was held, at which resolutions for liquidation by arrangement were passed, which were afterwards duly registered. Two of the ten hogsheads had been delivered before February, 1872, but the above-mentioned hogshead and the remaining seven, at the time of the filing the petition, were still lying at the Leith dock warehouse, to the order of Couston, Thomson, & Co., though in the books of that firm they had been transferred to the credit of Ward at the time of the sale.

At the time of the filing the petition large quantities of bonded goods, which Couston, Thomson, & Co. had sold, remained, as to some, in bonded warehouses belonging to the firm, and as to others, in neutral warehouses. Representative cases were chosen for obtaining the opinion of the court as to the title to goods so circumstanced, and Ward's case was selected to try the question as to goods in neutral warehouses.

Thomson stated by affidavit as follows: "It is the custom and usual practice in the wine and spirit trade in Liverpool for goods sold in bond (that is, upon which the government duty has not been paid) to remain in the bonded warehouse in which they are stored at the time of sale, in the possession or under the control of the vendor after they have been paid for by the purchaser, the vendor giving to the purchaser when required by him an authority to *receive the goods from him or [146 the warehouse keeper, called a delivery order. These delivery orders, if they are not applied for by the purchaser, are rarely, if ever, given to him at all, but the goods sold remain in the possession or under the control of the vendor, who charges warehouse rent for them to the purchaser, and when the goods are

required by the purchaser for use, he generally sends to the vendor the amount of duty payable, and the vendor pays the duty to the government, and forwards the goods to the purchaser or his order, making a small charge for so doing. In all cases on the sale of goods the same are transferred in what is called the bond-book of the vendor into the name of the purchaser, and are so transferred in transactions of a similar nature in the books of the late firm of Couston, Thomson, & Co."

Another witness, who was a wine and spirit broker, deposed: "I have been engaged in the wine and spirit business at Liverpool for fifteen years. I have considerable knowledge of the custom of the trade at Liverpool. It is the custom for the merchant, upon the sale of any goods, simply to enter the purchaser's name against the goods in his stock-book, and thus write all such goods out of his stock, holding them to the order of the vendee. The vendor then becomes the agent or trustee (and, as a rule, the warehouse keeper) for such goods, making a certain charge for warehouse rent. It is not the custom in Liverpool to give the vendee any delivery order or warrant for such goods, but such delivery order or warrant would be given if specially asked for, as it would be used in case of a transfer or re-sale to a sub-vendee."

The case was brought before the court by an application on the part of the Wards, for an order upon the trustee to deliver up to them the eight hogsheads. The county court judge decided in favor of the trustee as to seven of the hogsheads, but held that the application for No. 4100 on the 19th of February had determined the consent of the true owner as to that hogshhead, and that the Wards were entitled to it. The trustee appealed, and the chief judge decided that this also passed to the trustee (1). The Wards appealed.

(1) 1873. July 29. SIR JAMES BACON, C.J.: In this case the respondents have clearly admitted themselves and are made out to be the true owners of these goods; and it is precisely for their case that the Bankruptcy Act has made provision, enacting that the property of the bankrupt divisible amongst his creditors shall comprise, among other things, all goods and chattels being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner. The case of *Knowles v. Horsfall* (5 B. & A., 134), which has been quoted is still law; the case of *Hamilton v. Bell* (10 Ex., 545) is a totally different case, the question of reputed

ownership was never raised in it. Then as to the alleged and constructive demand, that does not vary the case, for notwithstanding that the goods remained in the possession of a person other than the true owner. The bankrupts might have dealt with the goods up to the time of the bankruptcy. The letter and check which were sent to the bankrupts by the respondents with the request to pay the duty on the whisky not having been acted upon before the bankruptcy, gave rise to a difference of the transaction as between the parties themselves, but not so as to alter the rights of third persons. *Knowles v. Horsfall* is not in the slightest degree affected as an authority by the circumstance that it was a special

*Mr. *Herschell*, Q.C., and Mr. *Wheeler*, for the appel- [147
lants: The consent of the true owner was determined by a *bonâ fide* demand of possession: *Belcher v. Bellamy* ⁽¹⁾; *Ex parte Dover* ⁽²⁾; *Ex parte Moldaut* ⁽³⁾; *Brewin v. Short* ⁽⁴⁾; *Smith v. Topping* ⁽⁵⁾; *Ex parte Cohen* ⁽⁶⁾.

Mr. *Benjamin*, Q.C., and Mr. *McConnell*, *contra*: There was no demand of possession. The true owners only wrote to the bankrupts as their agents, directing them to get the goods out of the custody of the wharfinger, from whom possession was never demanded. The case is governed by *Knowles v. Horsfall* ⁽⁷⁾.

SIR G. MELLISH, L.J.: This is an appeal from an order of the chief judge reversing part of an order of the county court judge, who held that one keg of whisky out of several was not within the order and disposition of the bankrupt with the consent of the true owner. The bankrupts had sold whisky to Ward, the testator of the appellants. The whisky was left on commission in a warehouse not *belonging [148 to the vendors, but a bonded warehouse. Some of it had been delivered to the purchaser, but the rest remained. The county court judge held that it was within the order and disposition of the bankrupt, except one keg, as to which the appellants on the 19th of February sent a letter to the bankrupts at their office in Liverpool, directing them to forward it, and inclosing a check for a sum sufficient to pay the duty on it, clear it, and enable it to be sent to them. This was the way in which delivery had been obtained on former occasions. The filing a petition for liquidation, which is equivalent to bankruptcy, took place on the 26th. The bankrupts did not return the check, so they had ample time to pay the duty, clear the whisky, and send it away before the bankruptcy. The question then is, was it at the time of the bankruptcy within the order and disposition of the bankrupts with the consent of the true owner? It is clear law, as laid down in *Smith v. Topping* ⁽⁵⁾ and other cases, that if the true owner *bonâ fide* demands possession with a view of taking possession before the bankruptcy, though from no fault of his own he fails to get it, the goods are not within the possession of the bankrupt with his consent. This case is within that rule. There was a demand of possession, and nothing to show that it was not a *bonâ fide* demand. The only difference between this and the ordinary case is, that here the

case. The order of the county court judge must therefore be discharged. The deposit will be returned. The trustee will have his costs out of the estate.

(1) 2 Ex. 303.

4 ENG. REP.]

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(2) 2 M. D. & D., 259.

(3) 3 D. & Ch., 351.

(4) 5 E. & B., 227.

(5) 5 B. & Ad., 674.

(6) Law Rep., 7 Ch. 20.

(7) 5 B. & A., 184.

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property was not in the actual possession of the bankrupts, but of another warehouseman, and the chief judge appears to have gone upon this. But it appears to me to make no difference, for though, in order to take the goods out of the possession of the bankrupts, notice must have been given to the warehouseman, still, for the purpose of determining the consent of the true owner, the bankrupts were the proper persons to receive the notice. The purchaser cannot be in any worse position because the bankrupts did not keep the goods in their own warehouse. I am of opinion, therefore, that the order of the chief judge must be reversed.

SIR W. M. JAMES, L.J. : I entirely agree.

Solicitors: Messrs. *Chester & Co.*; Mr. *Wynne*.

[Law Reports, 8 Chancery Appeals, 149.]

149] *GREAT EASTERN RAILWAY COMPANY v. TURNER.

L.C. Nov. 19, 1872

[1871 G. 67.]

Trustee—Illegal Trust—Bankrupt—Order and Disposition.

The chairman of a company, with the assent of the company, held in his name shares in another company, which had been purchased with the money of the first-named company. The chairman became bankrupt :

Held (reversing the decree of the master of the rolls), that, though the purchase by one company of shares in another company was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his assignees and that he must transfer them as the company should direct.

Ex parte Watkins (1) distinguished.

In the month of June, 1863, Horatio Love, then chairman of the board of directors of the Great Eastern Railway Company, on behalf of the company, and by their direction (as alleged by the bill), and with their money, purchased 102 shares in the Lynn and Hunstanton Railway Company, which shares were duly transferred to Horatio Love as a trustee for the company; the Lynn and Hunstanton Railway Company having notice of the facts. In August, 1863, Horatio Love ceased to be chairman, and J. Goodson succeeded him, whereupon the above-mentioned shares were transferred to J. Goodson. The shares were afterwards converted into £1020 stock, which was registered in the name of J. Goodson. In February, 1866, J. Goodson ceased to be chairman, and C. H. Turner succeeded him, whereupon the £1020 stock was transferred to C. H. Tur-

(1) 2 Mont. & A., 348.

ner as a trustee for the Great Eastern Railway Company. The stock certificate was sent to the Great Eastern Railway Company, and remained in their possession. In September, 1869 C. H. Turner was duly adjudicated a bankrupt, and J. Field and E. C. Foreman were appointed assignees under the bankruptcy.

Field and Foreman refused to transfer the shares to new trustees for the Great Eastern Railway Company, and the company thereupon filed the bill in this suit containing the statements above mentioned, and praying that the assignees might be ordered to transfer the shares as the Great Eastern Railway company should direct. *C. H. Turner, who was made [150 a defendant, stated that he was willing to make the transfer, but was advised that he could not safely do so, as Field and Foreman, his assignees in bankruptcy, objected.

Field and Foreman alleged that the purchase of the shares out of the money of the company and the transfer of the stock were illegal transactions, and that the vesting the same in the successive chairmen was a mere device for giving the additional credit to the chairmen; that the trust of the stock was not effectual, and that it remained in the order and disposition of C. H. Turner at his bankruptcy, and as such passed to his assignees, who claimed the same accordingly.

The master of the rolls dismissed the bill with costs as against all the defendants ⁽¹⁾.

The plaintiffs appealed.

Sir R. *Baggallay*, Q.C., and Mr. *Smart*, for the plaintiffs: The decision of the master of the rolls proceeded on the simple principle that the whole transaction was illegal. No doubt

⁽¹⁾ 1872. May 12. LORD ROMILLY, M.R.: The question in this case is very short. The plaintiffs are a company incorporated by act of parliament. The company are not by their act of incorporation enabled to purchase or hold shares in any other company. [His lordship then stated the facts of the case.] I think that the assignees are right, and I am of opinion that this stock, which the plaintiffs could not legally acquire or hold, cannot be said to be of that description of trust property which upon bankruptcy does not pass to the assignees. All that Mr. Turner did was to enter into an agreement to deal with the shares as the plaintiffs should require. This engagement his bankruptcy disqualified him from executing. The notice to the Lynn and Hunstanton Railway Company could not have prevented Mr Turner from transferring

the shares or the stock as he chose, nor would this have made the Lynn and Hunstanton Railway Company liable if they had adopted such transfer. Even assuming that the plaintiffs were the true owners, yet the shares were still with their consent in the ostensible ownership, that is in the order and disposition, of the bankrupt. I am disposed to think that the stock vested in the assignees in bankruptcy without the necessity of resorting to the order and disposition clause in the bankruptcy acts; but it is unnecessary to determine that question. I think also that the same question of principle arose in the case which was cited to me, *Ex parte Watkins* (2 Mont. & A., 348), and that by the decision in that case the question is concluded in favor of the assignees. The bill will be dismissed with costs.

151] the *shareholders could complain of the illegality, just as a *cestui que trust* could complain of an unauthorized investment: but neither the trustee nor his assignees could claim the fund.

Mr. Speed, for Mr. Turner.

Mr. Fry, Q.C., and Mr. Bagshawe, for Mr. Turner's assignees: The assignees have been directed by the Court of Bankruptcy to defend this suit. The Great Eastern Railway Company can never have been the owners of these shares, as such ownership was beyond their powers. The public, by the attorney-general, could interpose and prevent it. The company could not have compelled Turner to transfer: *Attorney-General v. Great Northern Railway Company* (*). If the company choose to create an illegal trust, they cannot enforce it against the creditors of Turner. *Ex parte Watkins* (†) and *Ex parte Ord* (‡) are clear authorities. If the directors negligently and improperly place a chattel of the company in the hands of a trader who becomes bankrupt, they cannot recover the chattel from the assignees: *Copeman v. Gallant* (†); *Joy v. Campbell* (§); *Ex parte Castle* (¶). The Lynn and Hunstanton Railway Company cannot recognize this trust: Companies Clauses Act, 1845, s. 20.

The only thing which the Great Eastern Railway Company can do would be to force the directors, who had acted illegally, to take the shares, and replace the money, and then the shares would certainly go to the assignee.

LORD SELBORNE, L.C.: I am sorry that I am unable, in this case, to follow the view of his lordship the master of the rolls.

As I see the facts, the legal conclusion to be drawn from them is not difficult. Supposing that there had been an authority by law to invest the funds of the company in the purchase of shares in the Lynn and Hunstanton Railway Company in the name of the chairman for the time being, then I take it to be clear, 152] beyond *controversy, that, even without any notice to the company, the principle of *Joy v. Campbell* (§), and the other cases of that class, would have prevented the application of the order and disposition clause of the Bankruptcy Act, and that the shares would not have passed to the assignees of the chairman.

The difference between the case which I have supposed and the present case is just this: that there was no authority to purchase either in the name of the company or in the name of the chairman, or in any other name. The company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done within the powers vested in it by law. Consequently a thing which is

(*) 1 Dr. & Sm., 154.

(†) 2 Mont. & A., 348.

(‡) Ibid., 724.

(§) 1 P. Wms., 314.

(¶) 1 Sch. & Lef., 328.

(§) 3 M. D. & D., 117; 7 Jur., 47.

ultra vires and unauthorized is not an act of the company in such a sense as that the consent of the company to that act can be pleaded.

The directors are the mere trustees or agents of the company — trustees of the company's money and property — agents in the transactions which they enter into on behalf of the company. In this case, without legal authority, and therefore without the consent of the corporation, whose trustees and agents they were, the directors took a part of the company's money, and therewith purchased a property which this contest proves to be of some value — shares in the Lynn and Hunstanton Railway Company. Those shares so bought — not a farthing of any other person's money having contributed to the purchase — were placed in the names of three successive chairmen of the company, and were uniformly dealt with as that which they were, the property of the company. True it is that the investment was an unauthorized investment; but I entirely assent to what was said by Sir Richard Baggallay, that there is no difference between an unauthorized investment of the money of a public company by its trustees, and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous — it would be extravagant to the very last degree — to say, that because the money of *cestuis que trust* has been laid out in an unauthorized manner, that therefore they are not to have the benefit of whatever value there is in the property bought with their money.

It is clear that the chairman, although this was an unauthorized investment, was a trustee of the shares bought with [153 the money of the company; but if the shares had become burdensome, the burden could not have been thrown upon the company. That is a proposition quite consistent with the other.

Then how can it possibly be said, there being this trust created by the company's trustees in their own wrong, binding on them, although not binding on the company, created by them, but not assented to by the company, that the company, as the true owners, have consented to allow their property to be placed in jeopardy by creating a reputed ownership in the name of its chairman? I cannot follow the proposition. While in the ordinary case of an authorized trust that order and disposition and reputed ownership which the statute contemplates are wanting, in this case of unauthorized trust the consent of the true owner, that equally essential ingredient to the creation of a reputed ownership, is much more wanting.

The case, therefore, seems to me to resolve itself into the ordinary one of trust money in the hands of trustees, which the court follows and traces into every investment which they have

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made. In the case of *Pennell v. Deffell* ⁽¹⁾, where an official assignee had carried moneys, which he had received for the purposes of his assigneeship, into an account which he kept in his own name with his bankers, and afterwards died insolvent, it was held the balances of that account, which could be ear-marked as having arisen from the trust moneys, passed to his successor in office. Whatever be the nature of the investment into which the trust money invested by a trustee can be traced, unless the *cestuis que trust* are affected by the consent which the statutes contemplates for the creation of reputed ownership, I apprehend it to be clear law that the money so invested does not pass on bankruptcy to the assignees, but remains the property of the person for whom it was originally held.

I will only add one sentence upon that class of cases which have been cited, and which appear to have been considered by the master of the rolls to be authorities for the decision at which his lordship arrived. They are undoubtedly cases in which an apparent exception is made to the general rule, that [54] where there is a *bonâ fide* trust the trustee does not hold the property in his order and disposition with the consent of the true owner, or with such a reputation of ownership as to cause the property to be treated his own as in case of bankruptcy. But the principle of the exceptions in those instances, which I will assume for the present purpose to have been correctly made upon the facts of those particular cases, is this, that there being no *bonâ fide* reason for the creation of any trust, the forms of a trust were gone through in order to conceal the true ownership of the property. That has been held to be in truth an abuse of the forms of a trust for the purpose of creating a reputation of ownership, and placing the property within the order and disposition of another with the consent of the true owner of the property.

For the reasons which I have already given, that principle cannot apply where a joint stock company is the true owner, and can have given no consent, and where the investment is an unauthorized investment of the money of the company as against the company, by the act of its trustees.

MINUTES: Declare that Henry Turner, at the date of his bankruptcy, was trustee for the plaintiffs of the £1020 stock of the Lynn and Hunstanton Railway Company. Decree that he be directed to transfer the stock to the plaintiffs, or as they shall direct. The costs of the suit up to the hearing in the court below to be paid by the assignees. No costs given to Turner. No costs of the appeal.

Solicitor for the company: Mr. W. H. Shaw.

Solicitors for the assignees of Turner: Messrs. Wilde, Berger, & Moore.

(1) 4 D. M. & G. 372; 18 Jur., 278.

[Law Reports, 8 Chancery Appeals, 155.]

L.C. Nov. 18, 19, 1872.

*DIXON v. MUCKLESTON.

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[1870 D. 54.]

Equitable Mortgage — Deposit of Old Deed — Priority.

The owner in fee of a farm deposited deeds of conveyance of the farm dated 1774, by way of security for money then due, writing at the same time a letter which stated that the deeds were the title deeds of the farm, and were to be a security. He afterwards deposited the subsequent title deeds of the farm, the earliest being dated 1787, with bankers, by way of security for money due to them; the title was investigated by the bankers, and they had no notice of the prior charge:

Held (affirming the decision of the master of the rolls), that the letter created an equitable charge on the farm, and that under the circumstances credit must be taken to have been given by the owner of the prior charge to the statement made by the mortgagor, that the deposited deeds were the whole of the title deeds; and that the owner of the prior charge had therefore not been guilty of negligence so as to deprive herself of her priority.

By indentures of lease and release bearing date the 11th and 12th of May, 1774, a certain farm called Pen-y-bank was conveyed to one Henry Bowdler, through whom it appeared to have come to his step son Charles Muckleston.

By indentures of lease and release bearing date the 2d and 3d of August, 1787, Charles Muckleston settled the Pen-y-bank farm and certain lands at Cotton Hill on himself for life, with remainder to his children as tenants in common. He had four children, of whom two died infants, so that the settled lands vested as to three-fourths in the surviving son, Edward Muckleston the elder, and as to one-fourth in a daughter, Mary, who by a settlement made on her marriage with Edward Shaw, and dated the 28th of June, 1814, conveyed her one-fourth to Edward Shaw, her husband.

Edward Muckleston the elder, by deeds dated the 21st and 22d of August, 1818, conveyed his three-fourths to trustees on trust for himself for life, with remainder to his child or children as he should appoint, subject to a jointure to his wife.

By deeds of the 21st and 22d of February, 1822, Edward Shaw conveyed his one-fourth to Edward Muckleston the elder.

By an indenture dated the 1st of February, 1848, Edward *Muckleston the elder appointed and conveyed the whole [156 of the settled lands (subject to the jointure) to his son Edward Muckleston the younger in fee.

Edward Muckleston the younger, being indebted to his aunt Mary Shaw in the sums of £400 and £1100, on the 25th of Oc-

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tober, 1864, wrote to her as follows: "When I last had the conversation with you about your interest, it was agreed between us that if I gave you 5 per cent. for the use of your £1100, you would be satisfied. I gave you the title deeds of Pen-y-bank farm on your £400 as a double security. I trust, therefore, as I pay you so regularly, you will not put me to the great expense of mortgaging my Bromlow property Besides, the deeds now in your possession are of more value than all the money I have now from you."

There was no statement how any of these deeds were deposited: but it was apparently assumed that the deeds relating to the Pen-y-bank farm were deposited with Mary Shaw by Edward Muckleston, and that both sets of deeds came into the possession of Mary Louisa Muckleston as executrix of Mrs. Shaw.

Mary Shaw died in 1865, having by her will appointed and bequeathed her residuary estate to Mary Louisa Muckleston, who was also appointed executrix. There were some dealings between Mary Louisa Muckleston and Edward Muckleston the younger which are not material to the decision of the case.

In February, 1868, Edward Muckleston the younger, being indebted to the plaintiffs, who were bankers, in the sum of £4591, deposited with them the deeds of 1787, 1818, 1822, and 1848, and other deeds relating to the Pen-y-bank farm and the Cotton Hill lands; and on the 24th of April, 1868, he gave a memorandum of deposit, with an agreement to execute a mortgage to the plaintiffs. The title appeared to have been advised upon by the solicitors of the plaintiffs, and the plaintiffs had no notice of the dealings with Mary Shaw.

Edward Muckleston, in 1869, became bankrupt, and the plaintiffs then filed the bill in this suit, claiming (amongst other things) priority for their charge on the Pen-y-bank farm and the Cotton Hill estate over the charge of Mary Louisa Muckleston.

She, by her answer, said that she held the deeds of 1774, re-
157] lating *to Pen-y-bank farm, and those of 1814, relating to one-fourth of both estates, and set forth the letter of the 25th of October, 1864, and contended that the claim of the plaintiffs was unfounded.

The master of the rolls made a decree in the suit that the charges of Mary Louisa Muckleston on the Pen-y-bank farm and the Cotton Hill estate had priority over that of the plaintiffs.

The plaintiffs appealed.

Sir R. Baggallay, Q.C., and Mr. Cookson, for the appellants: No doubt, as between persons having equitable rights, priority in time gives the better title, but that is only when their equi-

ties are really equal : *Rice v. Rice*.⁽¹⁾ The defendant here founds her equity on the possession of title-deeds relating to the estates in question, but in order that such an equity may prevail, those deeds must be material : *Lacon v. Allen*.⁽²⁾ ; *Roberts v. Croft*.⁽³⁾ The deed of 1774 formed no part of the present title, but the deeds delivered to us showed a complete title from 1787 ; and no mortgagee could expect, or purchaser demand, any earlier title. The deposit of an old and useless deed which happens to be in the hands of any one else cannot give a title or an equitable estate : *Rooper v. Harrison*.⁽⁴⁾ To call such a doctrine equitable is absurd ; nothing can be more inequitable. The deeds were examined on behalf of the plaintiffs, and a memorandum was carefully prepared. What more could they have done ? Edward Muckleston professed to be owner in fee, and showed a complete title ; and what could they have required more ? Mrs. Shaw, on the other hand, was guilty of negligence in not seeing that she had the real title deeds, and the defendant must take the consequences. *Hewitt v. Loosemore*.⁽⁵⁾ and *Colyer v. Finch*.⁽⁶⁾ show the rule where the contest is between two mortgagees ; *Lacon v. Allen* when it is between a mortgagor and an assignee in bankruptcy. *Roberts v. Croft* is distinguishable, because there the mortgagee was assured that he had all the deeds. In *Hunt v. Elmes*.⁽⁷⁾ and in *Ratcliffe v. Barnard*.⁽⁸⁾ there were merely bundles of deeds deposited. In **Doble v. Saunders*.⁽⁹⁾ a prior equitable mortgage was dis- [158 placed on the ground of laches : so in *Perry-Herrick v. Athwood*.⁽¹⁰⁾ *Jones v. Williams*.⁽¹¹⁾ is very like this case. If Mrs. Shaw employed no solicitor, she must be considered as her own solicitor, and must take the consequences of her own negligence. The bankers took every precaution short of getting in the legal estate. The allegations and evidence as to the deeds of 1774 are very scanty, and it does not clearly appear how Mrs. Shaw got those deeds. As to the Cotton Hill property, that is not mentioned in the memorandum ; and if Mrs. Shaw had the deeds of 1814 relating to it, she very probably got them as having belonged to her husband.

Mr. Southgate, Q.C., and Mr. Dryden, for Miss Muckleston, were not called upon.

LORD SELBORNE, L.C. : With regard to the principal question which has been argued, it will be right for me to make one or two observations upon the nature of these equitable securities.

(1) 2 Drew, 73.

(2) 3 Ibid., 579.

(3) 2 De G. & J., 1.

(4) 2 K. & J., 86.

(5) 9 Hare., 449.

(6) 5 H.L. C., 905.

(7) 2 D. F. & J., 578.

(8) Law Rep., 6 Ch., 652.

(9) 2 H. & M., 242.

(10) 2 De G. & J., 21.

(11) 24 Beav., 47.

Mr. Cookson, as to the question viewed in the light of principle merely. It may certainly be said, with great truth, that a man taking an equitable security with a deposit of deeds ought to look into the deeds, ought to make some examination of them, and ought to satisfy himself that they are not such as to leave in the hands of the person with whom he is dealing the power [161] of *going afterwards to somebody else, and dealing with him in like manner under the appearance of a perfect title. But here I am bound by the series of authorities which have decided — for I take it to be clear that they have gone to this length — that when the court is satisfied of the good faith of the person who has got a prior equitable charge, and is satisfied that there has been a positive statement, honestly believed, that he has got the necessary deeds — then he is not bound to examine the deeds, and is not bound by constructive notice of their actual contents, or of any deficiencies which by examination he might have discovered in them. This I take to be the law, even in cases where the depositor of the deeds is himself acting in the double character of borrower of the depositor's money and of solicitor for the depositor. In the cases which have been mentioned of *Hunt v. Elmes* ⁽¹⁾ and *Hewitt v. Loosemore* ⁽²⁾, and I think in some others also, the facts were of that character. In *Hunt v. Elmes* and *Colyer v. Finch* ⁽³⁾ the deeds had never been looked at, but credit had simply been given to a statement made, either upon the parcel containing the deeds or otherwise, that they were the proper deeds relating to the estate. In some of these cases the lender was not otherwise advised than by the solicitor of the borrower or by a solicitor having, as mortgagor, a personal contrary interest, and yet the lender was held not to be guilty of such neglect or laches as amounted to what is described by the Vice Chancellor Turner, in *Hewitt v. Loosemore*, as “gross and willful negligence, which in the eye of this court amounts to fraud,” merely because he believed the statement made to him, and abstained from examining the deeds, and did not employ an independent solicitor.

I am unable to distinguish this case in principle from the cases so decided; for what have we more than this? A lady, Mrs. Shaw — whom I must presume to have been unlearned in the law, and very unlikely, even if she had read the deeds, to be able to tell their precise bearing upon any question of title — gave credit to the representation made by her nephew under circumstances which would not suggest any reason for suspicion. The deeds were given to her, and, from what appears upon the very [162] scanty evidence, I *assume that they were not examined, but were believed, upon the statement of the mortgagor, which

(1) 2 D. F. & J., 578.

(2) 9 Hare, 449.

(3) 5 H. L. C., 905.

was sufficient as against him to preclude any necessity for further inquiry, to be the title deeds of the Pen-y-bank farm. When examined, they appear to be insufficient title deeds, though relating to the Pen-y-bank farm. If it had been suggested and proved that the deeds had been examined, and, being examined, had been found to be ancient and not essential to the title, that would have raised a different kind of case, upon which I express no opinion. But we have to deal with the simple fact of a security created in favor of a member of the family, stated in writing to be a security upon all the title deeds (for so I read the letter) of the Pen-y-bank farm, and nothing whatever to show that in honest good faith credit was not given to that statement.

That being so, my opinion is, that, according to the principles of the authorities, it is impossible to say that Mrs. Shaw or her niece has been guilty of such willful negligence as to raise an equity against the priority which they originally possessed. I think, therefore, that the decision of the master of the rolls is correct.

With regard to the Cotton Hill estate, the respondent has scarcely raised a contest, and I am inclined to think that, if the matter had been as carefully examined before the master of the rolls as it has been here, his lordship would not have fallen into the error into which, I think, he has certainly fallen in respect of that security. There is nothing to show in what manner those title deeds which relate to the Cotton Hill estate came into the possession of Miss Muckleston or of Mrs. Shaw, and that possession might be accounted for in a manner more consistent with the real title by supposing that they were in Mrs. Shaw's possession in her own original right, than by supposing that they came to her from Edward Muckleston. They are not mentioned in the letter, and the mere possession of deeds without evidence of the contract upon which the possession originated, or at least of the manner in which that possession originated, so that a contract may be inferred, will not be enough to create an equitable security. That this is so, appears, amongst other authorities, by the case of *Chapman v. Chapman* ⁽¹⁾.

*I am clearly of opinion, therefore, that, so far as the [163 decree of the master of the rolls extends the security in this case to the Cotton Hill estate, it is erroneous, although I believe the error to be one which his lordship would not have fallen into if his attention had been called as distinctly to the matter as mine has been.

The conclusion at which I arrive upon the whole of this case

(1) 18 Beav., 308.

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is, that the judgment of the master of the rolls should be affirmed with the variation which I have mentioned, excluding the Cotton Hill estate; that the respondents should add their costs of this appeal to their security, because I do not think the costs have been increased by the question about the Cotton Hill estate; and that in other respects no costs of the appeal should be given, but the deposit to be returned.

Solicitors: Messrs. *Milne, Riddle, & Mellor*; Mr. *W. H. Reece*.

[Law Reports, 8 Chancery Appeals, 167.]

L. C. Dec. 20, 21, 1872.

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**Ex parte* HENRY.

Patent — *Lodging Complete Specification* — 15 & 16 Vict. c. 88, s. 9 — *Law officer* — *Rival Inventor*.

It is the duty of the law officer to hear and determine which of two rival applicants for patents is entitled to a patent, and the question ought not to be remitted to the lord chancellor by directing warrants for both patents.

An applicant for a patent does not, by lodging a complete specification and obtaining protection, acquire the rights of a patentee so as, during the six months' protection, to prevent any other person who had previously applied for a patent for a similar invention from obtaining a patent.

It is no objection to the grant of a patent that another person has been making experiments and working towards a similar invention.

On the 25th of May, 1872, John Farquharson applied in the usual manner for a patent for an improvement in breach-loading firearms and left a provisional specification of his invention. On the 7th of June he gave notice of his intention to proceed; and on the 2d of July Alexander Henry lodged objections.

On the 26th of August, Henry applied for letters patent for an improvement in breach-loading firearms, and left a complete specification of his invention. He then gave notice of his intention to proceed, and Farquharson lodged objections.

Both of the applications were on the 7th of November heard before the solicitor-general, who expressed his opinion that the evidence was very contradictory, and said that he did not like to take upon himself the onus of deciding between the applicants. He should put the matter in a train for the decision of the highest authority, by causing warrants to be made for the sealing of both patents, and leaving the applicants to apply to the lord chancellor.

Warrants were accordingly made for sealing both patents, and each of the applicants presented a petition to have the great seal affixed to letters patent for his invention. Farquharson

lodged objections that Henry was not the first and true inventor, and had obtained knowledge of Farquharson's invention from a workman to whom Farquharson had explained it, and from having seen a rifle made according to Farquharson's invention. Henry lodged *objections that Farquharson was not the [168 first and true inventor; that the invention was the same as one for which Henry held a patent, or if there was any improvement it was an invention of Henry's, of which Farquharson had obtained knowledge from Henry's descriptions or drawings or from seeing Henry's workshops; and that as Henry had applied for a patent, and lodged a complete specification, and received protection for six months, which had not then expired, he had the same privileges as if he had letters patent; and letters patent for a similar invention could not be granted to any other applicant.

Both of the petitions now came on for hearing.

The LORD CHANCELLOR, when the petitions were opened, objected to their coming before him, and said that he understood it to be the proper duty of the law officer to determine these questions and to discharge the functions of a jury in deciding the matters in dispute. As, however, the applicants had obtained warrants, his lordship would hear the petitions, but the case must not be drawn into a precedent.

Mr. Aston, Q.C., and Mr. Lawson, for Henry: In the first place, the filing a complete specification has the effect of preventing any one else from obtaining a patent during the six months of protection: 15 & 16 Vict. c. 83, ss. 9, 16, 24. The question arose in a case of Tanner and Way, in which the attorney general consulted the lord chancellor, who was understood to have decided to that effect. That was also held in *Ex parte Bates & Redgate* (*), and the reason is that the applicant has performed his part of the bargain, and given his invention to the world, whereupon he has a right to his patent. The words of sections 6 and 9 of the act of 1852 are conclusive.

The LORD CHANCELLOR said that it was impossible to maintain that by filing a complete specification an applicant could for six months prevent any one else from obtaining a patent for a similar invention. His lordship could not hold the deposit of a complete specification to be equivalent to an actual grant of letters patent under the great seal.

*Mr. Aston and Mr. Lawson then proceeded to argue [169 that on the evidence the objections of Henry as to the means by which Farquharson obtained his invention were supported, and those of Farquharson failed.

(*) Law Rep. 4 Ch., 577.

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Mr. *Kay*, Q.C., and Mr. *Macrory*, for Farquharson, were not called upon.

LORD SELBORNE, L.C. : I have come to the conclusion that Mr. Farquharson's patent must be sealed, and that the application for the other patent must be entirely refused.

There are some questions of law and some questions of fact which have to be considered in this case. One question of law I disposed of during the course of the argument; but as it is desirable that the grounds upon which I did so should be well understood, I propose to say a few words upon that subject. Mr. Henry applied for a patent upon the 26th of August, 1872, and at the same time filed a complete specification; and the question was whether, under the statute, the effect of that complete specification was to make it an answer to any claim by any one else who had previously applied for a patent for the same thing, alleging himself to be the first inventor. The argument was founded upon the case of *Ex parte Bates & Redgate* ⁽¹⁾, which decided that, where a patent has actually been sealed, the crown will not afterwards enter into the question whether or not some one else, who had previously applied, was a prior inventor, and would in no case give a subsequent grant for the same thing for which a patent had already been granted before.

The principle of that decision plainly is, that what the crown has actually granted cannot, if vested in the grantee, be taken away from him and given to somebody else; and that the grant cannot be assumed to be void in this jurisdiction, but must be repealed by *scire facias* before the crown, consistently with the principles applicable to all crown grants, can properly grant a second patent for the same matter.

Then it was attempted to transfer the principle of that decision *to a case like the present, because there is a clause in one of the acts of parliament (15 & 16 Vict. c. 83, s. 9) which says that for a period of six months every person who has applied for a patent, and has filed a complete specification, shall, during the term of six months, have the like powers, rights, and privileges as might have been conferred upon him by letters patent duly sealed as of the day of the date of his application. That proviso of the act of parliament gives to the act, not of the crown, but of the party, such an effect as would put him, for a limited period of time, in a situation like that which, on the face of a royal grant, he would, according to the legal import of that grant, be put into. The whole foundation of that proviso is that there has been no sealed patent, and the whole question now is, whether there should be a sealed patent, and to whom it should be given. It is not contended that the mere lodging

(1) Law Rep., 4 Ch. 577.

a complete specification absolutely entitles the party who lodges it to have his patent sealed if he applies for it within six months; no one can contend that. But if the argument is not good for that, it is not good for anything at all. The analogy is false as derived from the case where a grant has actually been made and sealed; and in a case where no grant has been made or sealed, there is no obstacle to the crown doing what may appear to be right or just. So much for that part of the case with respect to the only point of law which appears to me necessary to be adverted to before I come to the questions of fact.

I apprehend that it would be no answer to a *bonâ fide* applicant for a patent, who has himself, by his own ingenuity, made a useful invention, and has applied for a patent before any one else claiming to have made the same invention — it would, I say, be no answer to him, assuming the absence of fraud or communication, to allege that experiments had been going on, or even drawings made, by another inventor. One person, being a *bonâ fide* inventor, comes first to ask for a patent for his invention, and such allegations are no answer to him. If a patent be granted to him, it would date from the day of his application. If he were the true inventor, the circumstance of something having taken place somewhere else, which was not disclosed to the world, and as to which no prior application was made, would be no answer to him, even if it were shown that the two inventors were travelling *very much upon the [171 same lines, and that their minds were going very much to the same point at the same time. I think I ought, if that be the state of the present case, to grant Mr. Farquharson his patent.

I now come to the questions of fact which have been raised in the case.

[His lordship then commented on the evidence, and came to the conclusion that Farquharson had made his invention independently; that letters patent for his invention should be sealed; that those for Henry's patent should not be sealed; and that Henry should pay the costs of the applications.]

Solicitors for Mr. Farquharson : Messrs. Collette & Collette.

Solicitor for Mr. Henry : Mr. J. H. Johnson.

[Law Reports, 8 Chancery Appeals, 171.]

L. C. Nov. 15, 1872.

BOWEN v. BARLOW.

[1867 B., 157.]

Will—Construction—Devise—Mortgage-money.

The lessee of a term of years in four houses assigned the term, by way of mortgage, to the owner in fee of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses Nos. 5, 6, 7, and 8, Stock street," and was at the time of his death in possession as mortgagee:

Held (affirming the decision of the master of the rolls), that the mortgage debt did not pass under the devise, but formed part of the testator's personal estate.

JAMES DAVERON, the testator in this case, was owner in fee simple of a piece of land in Stock street. On the 1st of February, 1855, he granted to one Thursby a lease of the piece of land for the term of ninety years, at a rent of £16.

By a deed dated on the following day Thursby assigned to the testator the term in the piece of land by way of security for advances and interest. The testator made advances to the amount of £500, and Thursby built four houses on the land. The testator entered into possession as mortgagee, and was in 172] possession at the *time of his death, the accounts between him and Thursby remaining unsettled. The testator, by his will, dated the 17th of May, 1861, directed the trustees thereof to stand possessed of "my freehold houses, Nos. 5, 6, 7, and 8, Stock street," upon trust for the benefit of his daughters and their issue. The testator died on the 17th of August, 1861.

The master of the rolls held that the devise of the houses did not include the mortgage debt due to the testator: as reported (*).

The *cestuis que trust* under the devise of the houses appealed.

The *Solicitor-General* (Sir G. Jessel), and Mr. *Everitt*, for the appellants: When a testator gives a house he gives all his interest in it, whatever that may be: *Woodhouse v. Mccredith* (*); *Emuss v. Smith* (*). If he had had a simple charge it would have passed. If a man owns a house subject to a charge which he buys up, the house would pass by the devise free from the charge. If he had the mortgage only, it would have passed by those words, and his having the reversion cannot affect the devise. If there were two moieties of a house, and the testator was owner of one and mortgagee of the other, both would pass by those words. The theory of the Wills Act is, that whatever interest a testator has shall pass by his will. If he had said, "all my estate and interest," there would have been no doubt, and that is what he has in fact given. The executors must come

(*) Law Rep., 11 Eq., 454.

(*) 1 Mer., 450.

(*) 2 De G. & Sm., 722.

into equity to raise this money as the term is gone; but where is their equity? There is none between a devisee and a personal representative: *Compton v. Oxenden* ⁽¹⁾. *Mathews v. Mathews* ⁽²⁾ is a very similar case.

Sir *R. Baggallay*, Q.C., and Mr. *Batten*, for the respondents, were not called upon.

LORD SELBORNE, L.C.: It appears to me perfectly clear that the decision of the master of the rolls in this case is quite right.

*Suppose that a testator had a freehold house held [173 under him by a tenant whose interest would of course be perfectly distinct from that of the testator; then suppose that the tenant was indebted to the testator; the testator would, therefore, have two distinct estates — one an estate in the house, the other an estate in the debt. The estate in the house would pass by a devise of the house, the estate in the debt would go to the executor as personal estate. The fact that the debt was secured by a charge on a term in the house could make no difference, and the fact that at law the term is merged cannot affect the construction of the will.

If matters had stood between the testator and his tenant as they originally were, the construction of the will would be clear. The testator had two distinct subjects for disposition, and by this devise he has, in my opinion, disposed of only one of them. His having taken possession as mortgagee could not make any difference unless the equity of redemption had been barred by lapse of time.

The case appears to me plain, and this appeal must be dismissed with costs.

Solicitors: Messrs. *Lloyd & Lane*; Mr. *E. H. Barlee*.

⁽¹⁾ 2 Ves., 69, 261.

⁽²⁾ Law Rep., 4 Eq., 278.

[Law Reports, 8 Chancery Appeals, 173.]

L.C. Nov. 21, 22, 1872.

PHILLIPS v. SILVESTER.

[1860 P. 119.]

Vendor and Purchaser — Possession — Rent — Willful Default — Deterioration.

A dispute arose between the trustees for a deceased vendor and a purchaser, the purchaser claiming to be entitled under his agreement to an additional piece of land. The trustees filed a bill and obtained a decree for specific performance, excluding the additional piece of land. The trustees had not allowed the purchaser to take possession of the rest of the land whilst the purchase money remained unpaid, and in the meantime the rest of the land was allowed to lie waste:

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Held (affirming the decree of the master of the rolls), that the purchaser must be allowed to set off against the interest payable by him the amount of rent which might have been received, and the amount of deterioration.

THE plaintiffs in this case were the trustees under the will of the Rev. S. H. W. Nanney, who had, on the 4th of August, 174] 1865, *agreed to sell to the defendant John Silvester, for £8500, certain lands at Towyn, in Wales; the purchase to be completed on the 25th of March then next, when the defendant was to be let into possession; and if the purchase was not then completed, the defendant was, until completion, to pay interest at the rate of 5 per cent. on £8075, the balance of the purchase money.

A dispute arose between the plaintiffs and the defendant whether a certain piece of land in the occupation of a railway company was included in the agreement for sale; and after several attempts to arrange the dispute the plaintiffs filed the bill in this suit for specific performance of the agreement. The defendant, by his answer, in effect claimed the whole of the land as included in the agreement; but submitted to perform the agreement as the court should direct.

The cause was heard on the 10 of February, 1872, when the master of the rolls made a decree that the agreement for purchase ought to be specifically performed; that the land occupied by the railway company was not included in the agreement; that, the title being accepted by the defendant, the plaintiffs should execute a proper conveyance, whereupon the defendant should pay to the plaintiffs the sum of £8075, being the balance of the purchase money; that the plaintiffs were entitled to interest at 5 per cent. on the said sum of £8075 from the 25th of March, 1866; that an account should be taken of rents and profits received by the plaintiffs in respect of the premises, or which, but for their willful neglect and default, might have been received; and an inquiry as to any deterioration in the premises since the 25th of March, 1866, and as to what would be required to restore them; and it was declared that the defendant would be entitled to set off against the interest the amounts so found; and the defendant was ordered to pay the costs of the suit other than such as related to the neglect and deterioration.

In pursuance of this decree, the balance of the purchase money had been paid, and the property had been conveyed; but the plaintiffs appealed against so much of the decree as related to willful neglect and default, and to deterioration.

It appeared that the tenant of the land had in 1865 given it up in contemplation of the change of ownership, and that the 175] land, or *a great part of it, had since remained unlet and

neglected. The house and buildings were allowed to go to ruin; and it was stated that the land was left wild and open to any one, so that gipsies pitched their tents upon it, and the neighboring farmers were in the habit of turning in their cattle. At one time the tithe-owners had seized the land in order to recover payment of the tithe rent charge, which was left unpaid. Negotiations had gone on between the parties, and it seemed that at one stage of the proceedings the purchaser would have been let into possession on payment of a disputed sum of £250 claimed by a former tenant. The tenant, however, when possession was demanded, acting under the orders of the trustees, refused to deliver possession; and the trustees alleged that they should not be justified in putting the purchaser into possession until his purchase-money was paid.

Sir *R. Baggallay*, Q.C., and Mr. *Rowcliffe*, for the appellants: All depends upon the question of who was in default. The master of the rolls has decided that the purchaser was in default, and therefore in effect that the purchaser ought to have taken possession at the appointed time. In *Ferguson v. Tadman* ⁽¹⁾ the purchaser was not in default. In *Binks v. Lord Rokeby* ⁽²⁾ and *Minchen v. Nance* ⁽³⁾ the purchaser was refused compensation. That is the rule laid down in *Dart's Vendors and Purchasers* ⁽⁴⁾. In *Leggott v. Metropolitan Railway Company* ⁽⁵⁾ no allowance was given. *Sherwin v. Shakespear* ⁽⁶⁾ shows that a vendor is not liable in an ordinary case. These plaintiffs were trustees, carrying into effect a contract made by their testator, and they could not prudently let in the purchaser without receiving the money. The court would not have directed them to admit the purchaser. The plaintiffs did all they could, and the purchaser refused every offer; he has been decided to be in the wrong, and must take the consequences.

Mr. *Fry*, Q.C., Mr. *W. W. Cooper*, and Mr. *H. Fawcett*, for the purchaser, were not called upon.

***LORD SELBORNE, L.C.:** With respect to the point which [176 has been argued upon this appeal, the master of the rolls has come to the conclusion that it was, under the circumstances, at their own risk that the vendors, insisting upon continuing in possession of this property pending the disputes between themselves and the purchaser, left it to fall into that state of dilapidation which the evidence proves, to a greater or less extent, to exist. Supposing that the question is looked at upon principle only, and without reference to authority, I cannot doubt

(1) 1 Sim., 530.

(2) 2 Sw., 222.

(3) 4 Beav., 332.

(4) 8th Ed., p. 596.

(5) Law Rep., 5 Ch., 716.

(6) 5 D. M. & G., 517.

that the master of the rolls has proceeded upon sound principles of equity.

By the effect of the contract, assuming there to be no ground on either side for simply setting it aside, according to the principles of equity, the right to the property passes to the purchaser, and the right of the vendor is turned into a money-right to receive the purchase-money, he retaining a lien upon the land which he has sold until the purchase-money is paid. Let us for a moment suppose the case of any other description of security, and that the holder of the security insisted, for his protection, upon entering into possession of the land over which the security extended—then is not such a person so entering into possession answerable, when the account under the security comes to be taken, for keeping the property in the condition in which a person in possession ought to keep it? I apprehend that he is so answerable; and, on principle, I can see no reason why a vendor, who insists upon continuing in possession of the land over which he has security—the contract being one which, in the view of a court of equity has changed the title of the land—I see no reason why such a vendor should not be under the same obligations as those under which any other person would be, who, having security on land, insisted on the possession of the land as a further security. He, when the account comes to be taken between himself and the purchaser, will be entitled to credit for all proper expenditure for the purpose of maintaining the purchaser's property in a proper condition, as against the account of rents and profits to which he is necessarily subject. He will receive, on the other hand, the interest which, by the contract he is entitled to receive. Perfect justice is done in that way; [77] and it is wholly unimportant, *as it appears to me, that he has the right, which undoubtedly he has, to insist upon retaining possession until payment of the purchase money is made and the conveyance is accepted. He has that right; but the question is, upon what terms that right is to be exercised? It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession. He is *pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any other person. In this particular case it so happens that the vendors, after Mr. Nanney's death, were his trustees. Supposing this contract had gone off, supposing that the purchaser had been unable to complete, would they have discharged their duty to their *cestuis que trust*, by leaving the property in this condition? It is plain that, if they set up their duty to their *cestuis que trust* as a reason (and

it may be a sufficient reason) why they would not give up the property without payment of the money, they undertook towards those *cestuis que trust* the very same duties which, in my judgment, they undertook towards the purchaser if it turned out that the beneficial interest was in him.

So I should have regarded the case, apart from authority. The vendors run no serious risk if they take that course, assuming always that the property is worth being preserved. No doubt there might be special circumstances tending to show that it was not worth being preserved, if the expenses of the necessary repairs would be greater than those which the property would bear. In that case it is very possible that a purchaser might have no claim if previous notice were given to him that, unless he would supply the vendors with funds in order to make the necessary repairs, the property must be left to take its chance. But no case of that kind is alleged here. There is nothing whatever to show, or to suggest, that this was not property which would bear the expense of keeping it in a proper state of repair; there is nothing to show or to suggest that the purchaser was not a person who could be made responsible for anything that might become due from him in pursuance of the contract. I entirely agree that the vendors were acting in their strict right and were doing nothing wrong in *insisting, [178 as they did, upon retaining possession until the purchase money was paid, yet, on the other hand, I cannot admit that that is any reason why they should be exonerated from the obligations attaching to persons insisting upon remaining in possession. As far as appears, they would have incurred no risk in allowing possession (the purchase money remaining unpaid) to be taken by a solvent and responsible purchaser, retaining, as they might have done, their lien for the purchase money over the estate. They were not bound to do so; but they cannot play fast and loose, and in one breath say, "The time has come when you might have taken, and ought to have taken, possession, and, therefore, you must bear the consequences of all the subsequent deterioration;" and in another breath say, "We have a right to refuse you possession, and we choose to exercise that right."

Now, the authorities appear to me to be entirely consistent with this view. One or two were referred to, but they simply come to this, that from the time when the party might have taken possession, and when it was his duty actually to take possession, if he does not do so he may be answerable for deterioration. I have no doubt whatever, that if in this particular case the plaintiffs had sent to Mr. Silvester and had said, "We are perfectly willing to let you go into possession subject to the question between us," and Mr. Silvester had said in reply, "I am willing

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to take possession, but I am not willing to pay the purchase money;" or if he had said, "I will not take possession unless you give me a conveyance and the whole thing is cleared up," Mr. Silvester would have put himself within the reach of those authorities. In that case, according to the contract, the time for taking possession would have come, possession would have been offered to him, and there would have been no obstacle or impediment to his taking it except one which, in the exercise of his strict rights, he would have himself created.

But although it is true that each party is entitled to refuse to alter the possession until the whole contract is completed, it is not true that when the parties differ upon some subordinate question as to the manner of completing the contract, whether in the form of the conveyance or in the parcels, each party being minded that the contract should go on, it is not true that giving [179] *possession to the vendor would be a departure from the ordinary course of proceeding. Possession may be changed before completion. But payment of the purchase money before completion is not according to the ordinary course of proceeding, although sometimes the money is paid into court.

Here there was a very small question between the parties as to this land occupied by the railway — a question as to parcels merely. The purchaser was willing to complete, and the vendor desired to compel him to complete, however that question might be determined. The purchaser was perfectly solvent, and there was no good reason why he should not be let into possession pending the settlement of the question, leaving the question of payment to stand over. At one time it appears to have been contemplated that on the payment of a small sum of money, £250, he might, and would have been, let into possession. But there was some misunderstanding as to the payment, and the delay unfortunately led to different views being taken by some of the parties, so that when the time had elapsed the consent of the vendors, which was necessary for the purchaser taking possession, was absolutely refused; and I cannot perceive that anything which afterwards took place changed the relative position of the parties.

My opinion is, that, in that state of things, there being proof of careless, and I must say wantonly negligent, conduct on the part of the plaintiffs, which has caused serious dilapidations, I cannot differ from the conclusion of the master of the rolls, or see any reason to alter his lordship's order in this respect.

Appeal dismissed with costs.

Solicitors, Messrs. *Gregory, Rowcliffes, & Ruple*; Mr. *J. Needham*.

[Law Reports, 8 Chancery Appeals, 206.]

L. C. and L. JJ. Dec. 9, 10, 16, 1872.

*CHAMBERLAYNE v. BROCKETT.

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[1870 C., 220.]

Charitable Gift—Oy-près—Perpetuity—Conditional Gift to Charity.

A testatrix, after stating to the effect that as she could not feel confidence that any of her relatives would spend her money in the way she would approve, she felt she was doing right in giving it in charity, bequeathed her residuary personal estate, consisting of pure personalty, to trustees upon trust to invest it in consols, and to make out of the dividends certain fixed annual payments for charitable purposes. She further directed that when and so soon as land should at any time be given for the purpose as thereafter mentioned, almshouses should be built in three specified places. And she further directed that the surplus remaining, after building the almshouses, should be appropriated to making allowances to the inmates:

Held (reversing the decision of the master of the rolls), that the residue was well given in charity, for that the gift to charity was not conditional and contingent, but there was an absolute immediate gift to charity, the mode of execution only being made dependent on future events, and an inquiry directed as in *Sinnett v. Herbert* ⁽¹⁾

THIS was an appeal by the attorney-general from a decision of the master of the rolls.

*Sarah Chamberlayne, by will dated the 13th of Jan- [207 uary, 1858, after giving various legacies, mostly for charitable purposes, proceeded as follows:

"As I consider all my family the same to me, I wish to make no difference, and as I could not select any of them that I confidently could feel would not spend my money on the vanities of the world, as a faithful servant of the Lord Jesus Christ I feel I am doing right in returning it in charity to God who gave it. I therefore give and bequeath all the rest, residue, and remainder of my personal estate and effects, whatsoever and where-soever, after payment of all my just debts, my funeral expenses and legacies as aforesaid, unto my said brothers, William Chamberlayne, John Chamberlayne, and H. T. Chamberlayne, and to the survivors and survivor of them, and to the executors, administrators, and assigns of such survivor upon trust that they do and shall, with all convenient expedition after my death, invest the same and every part thereof in the stock called £3 per cent. Consolidated Bank Annuities after selling such parts of the said residue as may be necessary for that purpose; and my will and desire is that the said trustees do and shall stand possessed of the said residue so invested as aforesaid upon the trusts, intents, and purposes following: (that is to say) upon

⁽¹⁾ Law Rep., 7 Ch., 282.

1872

Chamberlayne v. Brockett.

L. C. and L. JJ.

trust to pay out of the annual dividends or proceeds of the said residue so invested as aforesaid the sums following, yearly and every year for ever (that is to say)": [Here followed a list of small annual payments]. "And my further will and desire is, when and so soon as land shall at any time be given for the purpose as hereinafter mentioned, that an almshouse or almshouses, consisting of ten rooms with suitable appendages for ten poor persons, should be built in the parish of Southam, in the county of Warwick; also an almshouse or almshouses, consisting of five rooms with suitable appendages for five poor persons, in the parish of Long Itchington, in the county of Warwick" [similar directions as to two other almshouses], "all to be built in a plain substantial manner, no expensive ornament whatever." [Here followed directions as to the inmates]. "And my will and desire further is, that the surplus remaining after building the almshouses aforesaid should be appropriated to making weekly allowances to the inmates of each; and my will and 208] desire is that each *room in the several almshouses aforesaid should be supplied with a suitable Bible of a large type."

The above trustees were named executors.

William and John Chamberlayne predeceased the testatrix. Henry Thomas Chamberlayne, the sole surviving executor, proved the will, and filed his bill against the other next of kin for the administration of the personal estate. The attorney general was served with the decree. The residuary estate, which consisted of pure personalty, was found, on taking the account, to amount to upwards of £10,000. The master of the rolls, on the case coming on for further consideration, held that the residue was not effectually given in charity, but was divisible among the next of kin of the testatrix ⁽¹⁾.

The *Solicitor-General* (Sir G. Jessel), and Mr. Hemming, in support of the appeal: There is here a general intention declared of giving the property in charity, and remoteness is out of the question: *Attorney-General v. Bishop of Chester* ⁽²⁾; *Sinnott v. Herbert* ⁽³⁾. The old doctrine was, that when once an intention was shown to give property to charity, if the particular mode pointed out was impracticable, the disposition was carried into

⁽¹⁾ 1872. June 10. LORD ROMILLY, M. R., after giving his reason for holding some of the legacies void, continued: I am of opinion that the gift of the residue is also void, not as being affected by the Mortmain Act, but as being a perpetuity. Suppose a testator gave £1000 to be accumulated until some heir of John Jones should select a descendant of A. B. to receive it. That would

be void on the ground of perpetuity, because an indefinite period might elapse before the selection was made. So here there is no gift in charity unless and until some person gives land for the purpose of the charity, which may not happen for an indefinite period. I am, therefore, of opinion that there is an intestacy as to the residue.

⁽²⁾ 1 Bro. C. C., 444.

⁽³⁾ Law Rep., 7 Ch., 232.

effect *cyprès*: *Moggridge v. Thackwell* ⁽¹⁾; *Mills v. Farmer* ⁽²⁾; and the cases collected in *Jarman on Wills* ⁽³⁾. The distinction mentioned in the same treatise between a general gift to charity and a mere gift to a particular charity has never been sanctioned by the court of appeal, and we contend that it cannot be sustained; the current of authority *showing that a [209 gift for any charitable purpose shows the general intent to give in charity, unless there is something affirmatively to show that the testator means to give to a particular charity and not to any other. But assuming *Cherry v. Mott* ⁽⁴⁾ and that class of cases to have been well decided, they do not affect the present, for here a general intent to give in charity is in terms expressed. There being, then, a gift in charity, remoteness is out of the case, that doctrine having no application to a charity. *Martin v. Margham* ⁽⁵⁾ shows that the next of kin do not get the income the accumulation of which is forbidden by the Thellusson Act. The application of the *cy-près* doctrine is illustrated by *Hayter v. Trego* ⁽⁶⁾; *Loscombe v. Wintringham* ⁽⁷⁾; *Simon v. Barber* ⁽⁸⁾; *Da Costa v. De Pas* ⁽⁹⁾; *Cary v. Abbot* ⁽¹⁰⁾; *Attorney General v. Ironmongers Company* ⁽¹¹⁾; the only exceptions being such as *Attorney General v. Goulding* ⁽¹²⁾; *Attorney General v. Whitchurch* ⁽¹³⁾; and other cases of that class.

[They also referred to *Attorney General v. Andrew* ⁽¹⁴⁾; *Andrew v. Merchant Tailors Company* ⁽¹⁵⁾, and *Andrew v. Trinity Hall* ⁽¹⁶⁾.]

Sir R. Baggallay, Q.C., and Mr. Speed, for the plaintiff; and Mr. Fry, Q.C., and Mr. Cudman Jones, for the defendants: There is neither authority nor principle in support of the proposition that a gift for charitable purposes cannot be void for remoteness. If property is once effectually given in charity then remoteness is out of the question, but there is nothing to a gift which does not devote the property to charity until the happening of a future event, which may be beyond the period allowed by the rule against perpetuities. That, we say, is the case here; there is no immediate gift to a charity, nothing but a gift if and when somebody gives land, the income in the meantime being left undisposed of. The case is thus distinguished from *Attorney General v. Bishop of Chester* ⁽¹⁷⁾, *Sinnett v. Herbert* ⁽¹⁸⁾, and from *Henshaw v. Atkinson* ⁽¹⁹⁾, which, in other respects,

⁽¹⁾ 7 Ves., 36.

⁽²⁾ 19 Ves., 483, 485.

⁽³⁾ 2d Ed. vol. i., p. 199.

⁽⁴⁾ 1 My. & Cr., 123.

⁽⁵⁾ 14 Sim., 230.

⁽⁶⁾ 5 Russ., 113.

⁽⁷⁾ 13 Beav. 87.

⁽⁸⁾ 5 Russ., 112.

⁽⁹⁾ Amb. 228; 2 Sw., 487.

⁽¹⁰⁾ 7 Ves., 490.

⁽¹¹⁾ Cr. & P., 208; 10 Cl. & F., 908.

⁽¹²⁾ 2 Bro. C. C., 428.

⁽¹³⁾ 8 Ves., 141.

⁽¹⁴⁾ Ibid., 633.

⁽¹⁵⁾ 7 Ibid., 223.

⁽¹⁶⁾ 9 Ves., 525.

⁽¹⁷⁾ 1 Bro. C. C., 444.

⁽¹⁸⁾ Law Rep., 7 Ch., 232.

⁽¹⁹⁾ 8 Madd., 306.

is very similar to the present, and from all the cases in which the *cy-près* doctrine has been applied; for in all of them there was an immediate dedication of the property to the charitable purpose, the only futurity being in the actual carrying the charitable purpose into effect, without there being anything conditional in the terms of the gift. The conditional character of the present gift brings the case within *Cherry v. Mott* ⁽¹⁾. Where a gift is conditional there is no instance of the *cy-près* doctrine being brought in.

Mr. Hemming, in reply: *Henshaw v. Atkinson* went on the ground that the doctrine of perpetuity in no way applies to a charity, and it is treated in *Phillpott v. Governors of St. Georges' Hospital* ⁽²⁾ as deciding this.

Dec. 16. LORD SELBORNE, L.C.: The only question which appears to us to require decision in this case is whether, upon the true construction of the will, a trust for charitable purposes of the whole residuary personal estate was constituted immediately upon the death of the testatrix, or whether the charitable trust as to the residue not required to make the fixed payments mentioned before the direction as to the almshouses and alms people was conditional upon the gift of land at an indefinite future time for the erection of almshouses thereon. If there was an immediate gift of the whole residue for charitable uses, the authorities mentioned during the argument (*Attorney General v. Bishop of Chester*, *Henshaw v. Atkinson*, and *Sinnott v. Herbert*, to which may be added *Attorney General v. Craven* ⁽³⁾), prove that such gift was valid, and that there was no resulting trust for the next of kin of the testatrix, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, 211] and *could never take effect at all except on the occurrence of events in their nature contingent and uncertain. When personal estate is once effectually given to charity it is taken entirely out of the scope of the law of remoteness. The rules against perpetuities (as was said by Lord Cottenham in *Christ's Hospital v. Grainger* ⁽⁴⁾) "are to prevent, in the cases to which they apply, property from being inalienable within certain periods." The word "within" is here slightly inaccurate; "beyond" would have been more exact. But those rules do not prevent pure personal estate from being given in perpetuity to charity; and when this has once been effectually done, it is not (to use again Lord Cottenham's language) "either more or less inalienable" because there is an indefi

⁽¹⁾ 1 My. & Cr., 123.

⁽²⁾ 6 H. L. C., 338.

⁽³⁾ 21 Beav., 393.

⁽⁴⁾ 1 Mac. & G., 404.

nite suspense or abeyance of its actual application or of its capability of being applied to the particular use for which it is destined. If the fund should, either originally or in process of time, be or become greater in amount than is necessary for that purpose, or if strict compliance with the wishes and directions of the author of the trust should turn out to be impracticable, this court has power to apply the surplus, or the whole (as the case may be), to such other purposes as it may deem proper, upon what is called the *cy-près* principle.

On the other hand, if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*. We agree with what was said by the master of the rolls in *Cherry v. Mott* ⁽¹⁾, that "there may no doubt be a conditional legacy to a charity as well as for any other purpose;" and we think that the question whether this is so or not ought to be determined, like all other questions of construction, by the application of the ordinary rules of interpretation to the language of each particular will. We do not assent to the suggestion made by the solicitor general that *Cherry v. Mott*, and other cases of the same class which have followed it, were ill-decided. If we thought (as appears to have *been the view of the master of the rolls) that the case [212 now before us was really the same as if the testatrix had left her residuary personal estate to devolve on her next of kin, subject to a contingent gift to trustees "when and so soon as land shall at any time hereafter be given for the purpose," for the erection of almshouses upon the land to be so given, and the maintenance of alms people therein, we should probably have concurred in the conclusion of his lordship that a contingent gift to trustees (although for a charity), having the effect of rendering the property inalienable during the whole continuance of the preceding non-charitable estates, must, in order to be valid, necessarily vest within the same limits of time as if the trustees had taken the residue (upon the same condition) for their own benefit, or for any other than charitable objects.

If, therefore, we differ (as we are compelled to do) from the decree at the rolls, it is not on any principle of law, but upon the construction of this particular will. In this case the testatrix expressly declares her intention to "return" her whole

(1) 1 My. & C., 182.

residuary estate "in charity to God who gave it;" and she "therefore" gives and bequeaths it immediately upon her death to trustees to invest the whole in consols, proceeding to direct various specified payments to be made out of the trust fund so created, and adding the directions on which the present question arises for the erection of almshouses and the maintenance of almspeople therein "when and so soon as land shall at any time hereafter be given for that purpose." According to *Green v. Ekins* ⁽¹⁾ *Hodgson v. Lord Bective* ⁽²⁾ and other similar cases, a gift of the residue of personal estate carries with the *corpus* the whole income arising therefrom and not expressly disposed of as income, or expressly directed to be accumulated, from the day of the death of the testator. Here, therefore, nothing is undisposed of, there is no resulting trust for the next of kin. The intention in favor of charity is absolute, the gift and the constitution of the trust is immediate; the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode of charity to which the testatrix wished her property to be applied. Taking this 213] view of the proper construction of the will, we hold *the present case to be completely governed by *Attorney-General v. Bishop of Chester* ⁽³⁾, *Sinnott v. Herbert* ⁽⁴⁾, and the other authorities of that class; and we propose accordingly to vary the decree of the master of the rolls by a declaration that the residue of the personal estate of the testatrix (which we assume to be all pure personalty) is well given to charity, and by directing an inquiry similar in principle to that in *Sinnott v. Herbert*, whether any land has been given or legally rendered available for the purposes intended by the testatrix, further consideration being reserved. The costs of all parties of the suit and of the appeal will be paid out of the residuary estate, and the deposit will be returned.

The LORDS JUSTICES concurred.

Solicitors for the plaintiff and defendants: Messrs. *Taylor, Hoare, & Taylor*.

Solicitors for the crown: Messrs. *Raven & Bradley*.

⁽¹⁾ 2 Atk., 473

⁽²⁾ 1 H. & M. 376, 397.

⁽³⁾ 1 Bro. C. C., 444.

⁽⁴⁾ Law Rep., 7 Ch., 232.

[Law Reports, 8 Chancery Appeals, 220.]

L. JJ. Dec. 13, 1872.

* *Ex parte* SMART. In re RICHARDSON. [220]*Bankruptcy — Doctrine of Ex parte Waring — Double Insolvency — Bills drawn by a Third Party.*

L. & Co. employed S. & Co. as their correspondents at Havana, and R. as their correspondent in London. They consigned certain cargoes to S. & Co., at the same time informing them that they would draw bills on R. for the value. This they accordingly did, and the bills were accepted by R. Before the bills came to maturity S. & Co. sent remittances in short bills to R. to cover the amount of the bills, telling him to take them "against the acceptances." R. became bankrupt, and the acceptances were not paid, and soon after S. & Co. became insolvent:

Held (affirming the decision of Bacon, C.J.), that the remittances must be applied to meet the acceptances, under the rule of *Ex parte Waring* ⁽¹⁾,

It is no objection to the application of the rule in that case that the party sending the remittances was not a party to the bills as drawer or indorser, provided the bills were drawn in respect of a transaction in which he is liable.

THIS was an appeal from a decision of the chief judge in bankruptcy.

Messrs. Langs, Sons, & Co. were merchants residing at Bremen. They employed Mr. A. J. Richardson as their correspondent in London, and Messrs. Stephani & Co. as their correspondents at Havana.

On the 17th of November, 1871, Messrs. Langs drew two bills for £541 8s. 7d. and £600 (making together £1141 8s. 7d.) on Richardson, at four months after date, against a shipment of cheese made at the same time to Messrs. Stephani.

Messrs. Langs notified this to Messrs. Stephani by a letter, dated the 22d of November, 1871, in which they enclosed the duplicate bills of lading of the cheese, and said, "In settlement of this account we made free to value upon Mr. A. J. Richardson for your account, £1141 8s. 7d., payable 17 March, 1872."

These bills of exchange were accepted by Richardson, but when presented for payment at maturity were dishonored by reason of Richardson's insolvency. On the 17th of February, 1872, Messrs. *Stephani sent to Richardson short bills [221 to the amount of £2838 8s. 7d., with a letter of that date, in which they said:

"Enclosed we hand you first of" [mentioning the bills, amounting to £2838 8s. 7d.], "to the debit of your bill account against your acceptances of" [among others] "£1141 8s. 7d., due 20 March, on Langs, Sons & Co."

On the 26th of October, 1871, Messrs. Langs made a consignment of tea to Messrs. Stephani, and against such consignment

(1) 19 Ves., 345.

1872

Ex parte Smart. In re Richardson.

L. J].

drew a bill for £402 upon Richardson, dated the 29th of October, 1871, payable five months after date. This bill was accepted by Richardson, but dishonored when presented for payment at maturity.

By a letter, dated the 4th of November, 1871, Messrs. Langs duly advised Messrs. Stephani of their having drawn the last-mentioned bill, and on the 2d of March, 1872, Messrs. Stephani remitted to Richardson short bills to the amount of £1600 in a letter, in which they said, "the distribution of which we will give in our next."

Accordingly, on the 9th of March, Messrs. Stephani wrote again to Richardson a letter in which they said, "The engagements you have come under for our account have been noticed and passed in conformity to the different accounts. Our last remittance of £1600 you will take against" (among other bills) "£402 4s. 9d., due 1st April, on Langs, Sons, & Co."

On the 13th of March, 1872, Messrs. Stephani suspended payment, and their estate was being wound up according to the law of Havana.

On the 22d of March Richardson received from them the following telegram: "Pay bills maturing; otherwise, return remittances;" and in reply he telegraphed to them: "Through your failure I have stopped. Cannot return remittances."

On the same day Richardson filed a petition for the liquidation of his affairs by arrangement, and a resolution to that effect was passed by the creditors on the 11th of April, and Mr. F. B. Smart was appointed the trustee of his estate. At this date some of the bills remitted by Messrs. Stephani still remained in Richardson's possession.

Messrs. Langs claimed that such of the remittances made by 222] *Messrs. Stephani to Richardson as remained in specie at the date of the liquidation, might be applied to meet the particular bills for which they were intended, upon the principle of *Ex parte Waring* (1). The chief judge made an order that the proceeds of the remittances, so far as they existed in specie at the date of the liquidation, should be applied for the purposes for which they were remitted, as expressed in the letters referred to in the evidence, and that an inquiry should be made for the purpose of ascertaining who were the persons entitled to such proceeds under the foregoing declaration. From this decision the trustee of Richardson's liquidation appealed.

In an affidavit made by Richardson he said: "I acted as the London agent for Stephani & Co., and accepted, in the course of my business transactions with them, numerous bills on their account. There was no agreement or undertaking on my part

with them to specifically apply any moneys or drafts which they might remit to me for any particular purpose, or to the payment of any particular bill or bills which might be drawn by them or others on and accepted by me. The remittances made from time to time by them to me were not remittances of cash or bank notes, but were of bills drawn at from sixty to ninety days' date or sight on merchants in London, and such bills were paid by me into my bankers and placed to my general account, for which I was charged the usual banker's discount, and I also had to pay for the necessary stamps affixed to such bills. I had, prior to the filing of my petition, accepted bills on account of Stephani & Co. amounting to £28,569 or thereabouts, and they had remitted to me drafts on London mercantile houses amounting to £6300 or thereabouts. I did not consider the said bills so remitted were specifically applicable to the payment of any particular bills. On the contrary, I treated such remittances as general remittances on account from Stephani & Co., and took them to my bankers and discounted them in the usual way as I required funds, without reference to any specific application of the same to the bills mentioned in Stephani & Co.'s letters as coming due."

In the course of the argument before the lords justices Richardson was examined *viva voce* in court, and stated that, *Messrs. Stephani always used to send short bills, so [223 as to keep him in funds before the acceptances became due. He always understood that they would cover him in time. He was formerly in partnership with Messrs. Stephani, when they acted in the same way, and this course of business had been continued after the dissolution of the partnership for about three years. When the particular remittances now in question were sent there were no acceptances already due which had not been provided for.

Mr. *Dowdeswell*, Q.C., and Mr. *Jackson*, for the appellant: This case differs in two respects from *Ex parte Waring* ⁽¹⁾. In the first place, there was no specific appropriation of the remittances to the particular acceptances, but they were applicable to the general bill account between Stephani and Richardson. Stephani could not have filed a bill against Richardson to get back the remittances without paying off the whole account. In the second place, the rule in *Ex parte Waring* only applies as between the drawer or indorser of a bill and the acceptor. Here Messrs. Stephani were no parties to the bills, and it would be extending the rule beyond any previous authority to hold it applicable where the person sending the remittances is no party to the bills, and under no liability in respect of them. Again,

(1) 19 Ves., 845.

1872

Ex parte Smart. In re Richardson.

L.JJ.

in *Ex parte Waring* the funds in dispute were not remittances sent after the bills were drawn, but securities deposited with the bankers to induce them to accept the bills: *Powles v. Hargreaves* ⁽¹⁾; *Hickie & Co.'s case* ⁽²⁾; *Ex parte Stephens* ⁽³⁾.

What the respondent contends for is a violation of the bankruptcy laws; for it would give Messrs. Langs a preference to which they are not entitled over the other creditors. It is a mere accident that they have the advantage of the remittances by Stephani, for which they had never bargained.

Mr. Davey, and Mr. Finlay Knight, for *Langs & Co*: The correspondence shows distinctly that the remittances were sent to meet particular bills. If Richardson had discounted any of them, he might have been restrained from applying the proceeds 224] *to any other purpose. He might have refused to accept the bills drawn upon him, but having accepted them he could not apply the remittances to any purpose except to meet them: *Inman v. Clure* ⁽⁴⁾. We have a right to prove against Richardson's estate in respect of his acceptances, and also against Stephani's estate for the price of the goods. We have, therefore, a right to insist on the appropriation of the remittances to meet the acceptances of Richardson. We are not seeking to extend the rule in *Ex parte Waring* ⁽⁵⁾. The rights of the plaintiffs are the same as in that case. It can make no difference whether the person sending the remittances has drawn the bills or not, provided the acceptances have been given at his request and on his credit. The same difficulty arises in both cases, and there is no way of getting out of it but by applying the same rule. The principle of this case is well laid down by Lord Hatherley in *City Bank v. Luckie* ⁽⁶⁾.

Mr. Dowdeswell, in reply.

SIR W. M. JAMES, L.J.: The long, but not too long, and very able discussion of this case has convinced me that the decision of the chief judge ought to be sustained.

Two questions have been argued, which may be considered separately. First, as to the question of the appropriation of the remittances by Stephani & Co. to Richardson: I am of opinion that this question cannot be governed by what subsequently took place, but must be considered in the same way as if on the day when the acceptances became due, Stephani & Co. had been solvent and Richardson alone had been bankrupt. Under these circumstances Richardson would have received bills sent to him for the specific purpose of meeting bills being drawn upon him and to become due on that particular day, and

⁽¹⁾ 3 D. M. & G., 430.

⁽²⁾ Law Rep., 4 Eq., 226.

⁽³⁾ Ibid. 3 Ch., 753.

⁽⁴⁾ Joh., 769.

⁽⁵⁾ 19 Ves., 345.

⁽⁶⁾ Law Rep., 5 Ch., 773.

if Stephani Co. had heard that Richardson was becoming bankrupt in time to prevent the remitted bills from being issued, they would have been entitled to file a bill to say that they were sent for the purpose of taking up particular bills, and this would have been quite independent *of the taking of any ac- [225 counts between them and Richardson. Otherwise it might have been ruin to them, if they had made all their arrangements on the footing of these particular acceptances being met.

That being so, the question arises, in the second place, whether this state of circumstances is not precisely the same as in *Ex parte Waring* ⁽¹⁾ and *Powles v. Hargreaves* ⁽²⁾, and whether we ought not to come to the same conclusion as in those cases. Stephani & Co. had a right to say that the bills should not be applied for the general purpose of paying Richardson's creditors, but for the specific purpose for which they were intended; and, on the other hand, they had no right to leave Richardson's estate liable to pay his acceptances. Accidentally another person gets an advantage for which he had not stipulated, by reason of the adjustment of equities between the parties. It is said that we ought not to extend the doctrine of *Ex parte Waring*, but the rule laid down in that case has been often before the court, and neither the court nor the legislature has shown any disapproval of it. We are not really pressing it further. I cannot follow the argument that has been urged upon us, that the doctrine only applies where all parties are parties to the same bills, and does not apply to a case where there are distinct contracts. In truth the contracts which the holder makes with the drawer and acceptor of a bill are really distinct contracts; but it does not appear to me that the decision in *Ex parte Waring* depends on any such connection between the parties. The reason of the decision is, that the equity cannot be worked out without the application of such a rule.

I think the chief judge was right, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.: I am of the same opinion. Taking Richardson's statement of the course of business to be correct, I think there was a specific appropriation of the remittances to take up the particular bills. There had been a partnership, and on the dissolution of the partnership *the same course [226 of business continued; and the course was, that when Stephani purchased goods of Langs & Co. in Havana, Richardson accepted bills drawn by Langs & Co. for the accommodation of Stephani, and that other bills were transmitted by Stephani to

(1) 19 Ves., 345.

(2) 3 D. M. & G., 431

meet them as they became due, and that Stephani always specified the bills which the remittances were intended to meet. Therefore I think there was specific appropriation of these remittances. If Richardson had dishonored any of the bills sent to him for acceptance, he might have been compelled to apply the remittances to meet them. Then, does the doctrine of *Ex parte Waring* ⁽¹⁾ apply? If Messrs. Stephani had drawn the bills themselves and endorsed them to Langs & Co., it would clearly have been within the rule. Does it make any difference that they got Langs & Co. to draw for them to meet the debt; so that the only difference was, that if the bills were dishonored, instead of Langs & Co. having a remedy on the bills against Messrs. Stephani, they could only bring an action for the value of the goods? I think the same difficulty arises as in *Ex parte Waring*; and there is no way of adjusting the equities between the parties except by applying the bills to meet the particular acceptances to which they were appropriated.

Solicitors: Messrs. *Mercer & Mercer*; Mr. *W. A. Orump.*

[Law Reports, 8 Chancery Appeals, 237.]

L. J.J. Dec. 12, 1873.

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*KENNARD v. KENNARD.

[1871 K. 21.]

Power — Defective Execution.

A lady having a power of appointment by deed or will over certain leasehold property, which in default of appointment was vested absolutely in her, wrote and signed an unattested paper, by which, after referring to the property in terms sufficient to identify it, she proceeded: "If I die suddenly I wish my eldest son to have it. My intention is to make it over to him legally if my life is spared." She died within three months, leaving this memorandum among her papers, and without having otherwise exercised her power:

Held (affirming the decision of the master of the rolls), that the memorandum was a defective execution of the power, and that equity would relieve against the defect in favor of the eldest son.

In 1842 Mary Anne Kennard was entitled under the will of her father to one undivided moiety of certain freehold and leasehold properties, her sister, Mrs. Mann, being entitled under the same will to the other moiety.

By deed dated the 6th of December, 1842, duly acknowledged by M. A. Kennard, she and R. W. Kennard, her husband, conveyed her moiety of the freeholds to B. Davies in fee, and assigned to him her moiety of the leasehold, by way of mortgage

⁽¹⁾ 19 Ves., 345.

for securing £1200 advanced by Davies to Mr. Kennard; and it was witnessed that in pursuance of the desire of R. W. Kennard and Mary Anne his wife, of limiting and reserving to her a power of appointment over her moiety of the premises, and in consideration of her concurrence in the deed, each of them, R. W. Kennard and M. A. Kennard, with his concurrence, granted, declared, and agreed with the other of them that the moieties thereby granted and assigned of and in the freehold and leasehold premises respectively, but subject to the conveyance and assignment, and to the £1200 and interest, should respectively, as well before as after the mortgage should be paid off, be in trust for such person or persons for such estate or estates, interest and interests, and with, under, and subject to such powers, provisos, and directions as M. A. Kennard, whether covert or sole, by any deed or deeds, instrument or instruments, in writing *to be by her sealed and delivered in [228 the presence of and attested by one witness at the least, or by her last will and testament, or any codicil or codicils, to be by her signed and published in the presence of and attested by two credible witnesses present at the same time, should in her uncontrolled discretion nominate or appoint; and that the said moieties of the said freehold and leasehold premises should, if and when the £1200 and interest should be paid off, be conveyed and surrendered accordingly to the appointees of M. A. Kennard, or subject to the power aforesaid, as the case might be, discharged from the said £1200 and interest. The proviso for reconveyance was to reconvey and reassure the said moieties, subject and without prejudice to the powers limited to M. A. Kennard, unto or to the use of R. W. Kennard and M. A., his wife, for such estates or interests as they were respectively entitled to therein before the execution of the mortgage deed, or otherwise as the appointment of M. A. Kennard, and the acts, defaults, and deaths of the parties, or other circumstances, should require.

In 1856 R. W. Kennard paid off the mortgage, but no reconveyance was executed. Kennard died in January, 1870, leaving his wife surviving.

On the 2d of December, 1868, Kennard gave to his wife the following memorandum:

"Dearest Anne — I lately signed my will. I did not include in it any of the bequests made by your father in his will, which you are aware I never touched, but handed it over to you from time to time. I never intended to touch it, and I leave it entire and absolutely to your will and pleasure.

"Ever your affectionate husband,

"ROBERT WILLIAM KENNARD."

1872

Kennard v. Kennard.

L. C.

Shortly after Kennard's death, Mrs. Kennard wrote and signed the following paper, which she placed in the same envelope with her husband's note :

" My own money saved intended for Bruce.

" The money I had with my sister, Mrs. Mann, was left to me. I let my late husband have it when he was in difficulties as security for money. He never took it, and wrote the inclosed for me to keep to prove what I have written.

229] *** If I die suddenly, I wish my eldest son, Robert Bruce Kennard, to have it and the money that I have saved in my iron safe. My intention is to make it over to him legally if my life is spared.

" M. A. KENNARD.

" January, 1870."

Mrs. Kennard was taken ill on the 21st of March, 1870, and died on the 23d without making any other disposition of her property by will or otherwise.

The above freehold and leasehold properties were the only property, real or personal, which Mrs. Kennard ever held jointly with Mrs. Mann. It was admitted that by "Bruce" was intended Robert Bruce Kennard.

The money saved by Mrs. Kennard in her iron safe was £545.

Robert Bruce Kennard filed his bill for administration of Mrs. Kennard's personal estate, and for a declaration of his rights in respect of the leaseholds and the £545, under the deed of the 6th of December, 1842, and the memorandum of January, 1870. As he was heir-at-law of his mother no question arose as to his right to the freeholds.

The master of the rolls made a decree declaring that the document in the bill mentioned, dated "January, 1870," and signed "M. A. Kennard," operated as an effectual appointment under the indenture of the 6th of December, 1842, of the property of M. A. Kennard comprised in that indenture, but did not pass the money deposited by Mrs. Kennard in the iron safe.

Howard John Kennard, the administrator, and one of the next of kin of Mrs. Kennard, appealed from this declaration.

Mr. Fry, Q.C., and Mr. Cracknall, for the appellant: The question in all such cases is, whether there is an intention immediately and irrevocably to exercise the power. We contend that in the present case there was no such intention. Mrs. Kennard only expressed an intention to deal with the subject matters of this document by a subsequent instrument, and did not mean this writing to be a disposition: *Carter v. Carter* (1); 230] **Proby v. Landor* (2); *Garth v. Townsend* (3), which last is almost identical with the present case.

(1) Mos., 366, 369.

(2) 28 Beav., 504.

(3) Law Rep., 7 Eq., 220

Mr. Southgate, Q.C., and Mr. W. Pearson, for the respondent, were not called upon.

SIR W. M. JAMES, L.C. : I am of opinion that the decision of the master of the rolls is quite right. In favor of purchasers or children the court relieves against the defective execution of a power, provided it sufficiently appears that there was an intention on the part of the donee to give the property which he had power to dispose of. Here the lady had power to give the property by an instrument sealed and delivered. By an instrument not sealed and delivered she expresses her intention that her son shall have the property which is subject to the power, and the case is one in which a court of equity will relieve against the defective execution. In *Garth v. Townsend* I considered that, upon the true construction of the instrument, there was no intention to give the property, but only to request the persons taking it in default of appointment to make a certain application of it, without legally binding them to do so.

SIR G. MELLISH, L. J. : I am of the same opinion. A doubt which I felt, whether this instrument was not intended to be a will, and whether an instrument intended to operate as a will, but incapable of doing so, could operate in another way, has been removed during the argument. The donee of the power expresses an intention to give the property by a more formal instrument, but still shows her intention to give it. She means in any event to give it, but to do so by a more formal instrument if her life is spared.

Solicitor for the appellant : Mr. William Moon.

Solicitors for the respondent : Messrs. Collette & Collette.

[Law Reports, 8 Chancery Appeals, 231.]

* *Ex parte HOOSON. In re CHAPMAN & SHAW.* [231]

L.JJ. Dec. 18, 1872.

Bankruptcy — Power of Imprisonment for Debt — Conviction under Debtors Act, 1869, ss. 4, 9 — Money received by way of Fraudulent Preference — Fiduciary Capacity

A creditor who has received money from a bankrupt by way of fraudulent preference, and has been ordered to repay it to the trustee of the bankrupt's estate, is not a person holding money in a fiduciary capacity under the 4th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and cannot, therefore, be committed to prison under that section.

The 9th section of the Debtors Act, 1869, does not preserve to the Court of Bankruptcy any powers of imprisonment for debt which have been taken away from other courts by the act.

Decision of Bacon, C.J., affirmed.

1872

Ex parte Hoosen. In re Chapman & Shaw.

L.JJ.

THIS was an appeal from an order of Sir James Bacon, the chief judge in bankruptcy.

Messrs. Chapman & Shaw, the bankrupts, were building contractors at Halifax. Shortly before the bankruptcy Shaw paid a sum of £300 to Hannah Louisa Wood, a married woman, in repayment, as she alleged, of a loan of that amount made by her. A jury which was impannelled on the 17th of June, 1872, found that the money was paid to Mrs. Wood by way of fraudulent preference, and the judge of the county court, sitting at Halifax, made an order directing her to repay the amount to the trustee in the bankruptcy. Mrs. Wood disobeyed the order, and the county court then made an order, on the application of the trustee, committing Mrs. Wood to prison for nine months, being of opinion that the case came within the 3d clause of the 4th section of the Debtors Act, 1869 ⁽¹⁾.

232] *From this order Mrs. Wood appealed to the chief judge, who reversed the order of the judge of the county court; and the trustee under the bankruptcy now appealed from the decision of the chief judge.

Mr. Bagley, and Mr. W. Barber, for the appellant:

The respondent held the money in a fiduciary character within the meaning of the 4th section of the Debtors Act, 1869.

[The LORD JUSTICE JAMES: The order on the face of it is wrong, for it is an absolute order of committal for nine months for contempt of court in non-payment of money. This is a penal sentence. The Court of Chancery never made an order in this form.]

If the order is informal it may be amended. It was meant to be under the 4th section, which reserves power to commit for a period not exceeding one year: *Middleton v. Chichester* ⁽²⁾. The 9th section of the Debtors Act, 1869, provides that "nothing in this part of the act shall in any way affect any right or power under the Bankruptcy Act, 1869, to arrest or imprison any person." This act was passed before the Bankruptcy Act, 1869, but (by sect. 3) it is provided that it shall not come into operation till the day on which the Bankruptcy Act comes into operation. Then the Bankruptcy Act, 1869, s. 66, enacts that "every

(1) 32 & 33 Vict. c. 62, s. 4: "With the exceptions hereinafter mentioned, no person shall after the commencement of this act be arrested or imprisoned for making default in payment of a sum of money."

"There shall be excepted from the operation of the above enactment" [then follow six exceptions, of which the third is as follows:]

"3. Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a court of equity any sum in his possession or under his control:

"Provided that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year."

⁽²⁾ Law Rep., 6 Ch., 152.

L. JJ.

Ex parte Hooson. In re Chapman & Shaw.

1872

judge of a court of bankruptcy shall, for the purposes of this act, in addition to their ordinary powers as a county court judge, have all the powers and jurisdiction of a judge of Her Majesty's High Court of Chancery." It follows, therefore, that the effect of the 9th section of the Debtors Act was to reserve to the local court of bankruptcy all the powers of imprisonment for debt which the Court of Chancery had before the Debtors Act came into operation. Such an order might have been made by the Court of Chancery before the act.

Mr. *De Gez*, Q.C., and Mr. *Ambrose*, for Mrs. Wood, were not called on.

*SIR W. M. JAMES, L.J. : I am of opinion that this is [233 a very idle appeal. The trustee ought to have been advised not to insist on the improvident order of the county court judge. The order of committal was such as had never been made by the Court of Chancery, and was justly characterized by the chief judge as novel and surprising. There was no fiduciary relation between the bankrupt and the creditors, still less between Mrs. Wood, who received the money by fraudulent preference, and the rest of the creditors. The order of the chief judge was quite correct, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J. : I am of the same opinion. The only question was as to the construction of sect. 4 of the Debtors Act, 1869. I think it was only intended to reserve to the Court of Bankruptcy all those special powers of imprisonment which were given to it by the Bankruptcy Act, 1869, and that it was not intended to reserve to it a power of imprisonment for debt, of which the Court of Chancery is itself deprived. It would be very surprising now that all matters relating to the estate of a bankrupt are tried in the Court of Bankruptcy, if the power of imprisonment for debt should remain in all cases in which the creditor became a bankrupt, though it is abolished in other cases. This is simply a case of payment of money by fraudulent preference, the remedy for which must be enforced in the ordinary way.

Solicitors for the appellant : Messrs. *Williamson, Hill, & Co.*, agents for Messrs. *Norris, Foster, & England, Halifax*.

Solicitors for the respondent : Messrs. *Bower & Cotton*, agents for Mr. *Jubb, Halifax*.

[Law Reports, 8 Chancery Appeals, 237.]

L. C. Dec. 13., 1872.

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*EX PARTE SHEFFIELD.

Patent — Opposition — Law Officer — New Questions.

In opposing the grant of letters patent, the burden is on the opponent to show that the grant would be clearly wrong.

Where the facts on which the opponent relies were within his knowledge when he opposed before the law officer, he cannot, when before the lord chancellor, raise a new legal argument on these facts; nor can he then bring forward evidence which he might have brought before the law officer.

JAMES SHEFFIELD, on the 11th of May, 1872, applied for a patent for an improvement in furnaces for melting glass, and left with his petition a complete specification of his invention.

On the 31st of May he gave notice of his intention to proceed. Objections were lodged by A. C. Stevenson, who had, on the 22d of March, 1872, applied for letters patent and left a provisional specification of a similar invention. The objections were: That Sheffield was not the first and true inventor; that the invention was in part substantially the same as that of Stevenson; and that the application was in fraud of the rights of Stevenson. Sheffield also lodged objections to Stevenson's patent.

Both sets of objections were argued before the attorney-general. Stevenson appeared to have then relied principally on evidence that Sheffield took his invention from Stevenson, and that the statements of Sheffield on the subject were false. The attorney-general dismissed Stevenson's objections, and ordered him to pay the costs.

On the 21st of August a warrant for sealing Sheffield's patent was made, and on the 26th of August Stevenson filed objections to the sealing, one of which was that the invention had been previously in use.

On the 10th of September Sheffield presented a petition that letters patent for his invention might be sealed. Stevenson then applied to the attorney-general for a rehearing, which was at first refused but afterwards granted by the attorney-general. The case was re-heard before him on the 7th of October, when he refused to alter his decision, and ordered the opponent to pay the costs. There was a dispute whether the attorney-general then entered into the merits and had read further evidence 238] offered by Stevenson, *or considered that a complete specification was a bar to any opposition.

Sheffield's petition now came on to be heard.

Mr. Aston, Q.C., and Mr. Lawson, for the petitioner: It is clear that there can be no opposition on facts which have already

been placed before the attorney-general: *Re Simpson* ⁽¹⁾. There is some new evidence, but it is only to the facts previously stated. If a *prima facie* case for a patent is made out, the patent will be granted. *In Re Vincent's Patent* ⁽²⁾ shows that the lord chancellor will not interfere with the decision of the law officer unless fraud or surprise is shown. If this point is decided in our favor, we need not go into the evidence.

Mr. Kay, Q.C., and Mr. Macrory, for Stevenson: We do not intend to argue the points which were decided by the attorney-general, but we say that the evidence shows a prior publication of the patent. On this point we propose to offer new evidence which could not have been given before.

[THE LORD CHANCELLOR: I cannot allow objections founded on known facts to be for the first time raised at this stage of the proceedings.]

The attorney general on the rehearing thought that the complete specification was a bar to our obtaining a patent, and did not go into the other questions.

[THE LORD CHANCELLOR: I must consider that the attorney general looked at the evidence. If he had decided on that technical point he would not have made Stevenson pay the costs.]

If this was an appeal from the attorney general it would be competent to either side to raise new questions on the facts. There is no rule that such questions shall not be raised in patent cases, and it would not be right to establish such a rule. Stevenson may be quite right, and ought not to be subjected to the expense of disputing the validity of a patent.

But this is not an appeal. We oppose at a different stage and *on different grounds, and we may bring in new evidence. [239 The only question is whether the patent is good, and that ought to be decided now.

[The LORD CHANCELLOR: The court never decides that question, but merely decides whether the applicant can be allowed to proceed].

In *In re Russell's Patent* ⁽³⁾ and *Re Adamson's Patent* ⁽⁴⁾, the lord chancellor considered himself bound to decide on the validity. Even where there had been no opposition before the attorney general, opposition to sealing has been allowed: *Ex parte Manceaux* ⁽⁵⁾. Your lordship must either decide this question or refer it back to the law officer.

LORD SELBORNE, L.C.; It appears to me that the whole facts upon which the opposition to this patent is founded were per-

⁽¹⁾ 21 L. T. (O.S.), 81.

⁽²⁾ Law Rep., 2 Ch., 341.

⁽³⁾ 2 De G. & J., 130.

⁽⁴⁾ 6 D. M. & G., 420.

⁽⁵⁾ Law Rep., 5 Ch., 518.

fectly and fully within the knowledge of Stevenson, who opposed actively before the attorney general, and who took his own course in that opposition. I am, therefore, not prepared to allow the case to be reargued upon the legal effect of those facts when presented in a somewhat different point of view from that in which they appear to have been presented to the attorney general. If that were to be permitted, the consequence would be, that the preliminary inquiry before the attorney general would be attacked in every case; and the whole matter which it is his proper business to investigate would be opened and gone into *denovo*.

Now that is not a practice which has ever been followed, or which, as far as I can see, was in the contemplation of the legislature. If parties having full knowledge of the facts, and taking their own course in their manner of using the materials within their knowledge, either do not raise before the attorney general a particular argument upon the facts, or do not bring forward all the evidence bearing on those facts and then at their command, they, in my judgment, are not entitled to the indulgence of having the matter remitted back to the attorney general, 240] nor have they any *right to call upon the lord chancellor to discharge in that respect the office of the attorney general.

It has been often said, and I think justly said, that in all these cases the whole burden is upon the opponent, who has to show that he has so clear a case as to make it right to do that which, if wrongly done, would, so far as relates to the patentee, be irreparable, but which, if left undone, would not inflict upon the opponent any irreparable injury. No doubt new facts might raise a totally different question, but to offer new arguments upon the old facts, in order to bring the lord chancellor to the conclusion that the case is so clear as to make it right to shut out the patentee forever by refusing to seal his patent, would really be a hopeless task; and in my judgment it would be a very unwise thing, if any encouragement whatever were given to such a course of practice. None of my predecessors, as far as I am aware, have ever done so, and it is evident that in the case of *Ex parte Manceaux* ⁽¹⁾ the lord chancellor was of opinion that when an objection had not been brought before the attorney general, the proper course, if there was a case for any indulgence, was, not for the lord chancellor to discharge the attorney general's office, but for the lord chancellor as a matter of indulgence, and upon terms, to refer it back for the attorney general's decision.

Now in this case the whole matter was fully gone into by the attorney general. He gave a considered judgment upon the

(¹) Law Rep. 5 Ch., 518.

case as it had been presented to him. [His lordship then stated the further proceedings.] In that state of circumstances, to refer the matter back to the attorney general would, I think, be to express a doubt which I do not feel, as to his having properly exercised the authority given to him, or as to his having properly discharged his duty.

On the whole, it seems to me that the usual course must in this case be followed. The patent must be sealed; and then, if Mr. Kay's client is really able to establish the fact that there was a prior publication and user of this same identical invention, or any material parts of it, before the application for the patent was made, of course he will be entitled to raise all such questions at law.

I am afraid I must give to the petitioner the costs of this application. I say "I am afraid" because in cases of this [241] sort the real merits of the patent cannot be ascertained; and it may possibly be the case that an opponent has a perfectly good case to be made at the proper place and at the proper time. However, I must give the costs.

Solicitor for the petitioner: Mr. J. H. Johnson.

Solicitors for the opponent: Messrs. *Bristows & Carpmael*.

[Law Reports, 8 Chancery Appeals, 241.]

LONDON AND SOUTH WESTERN RAILWAY COMPANY v. JAMES.

L. C. and L. JJ. Dec. 4, 1872.

[1872 L. 99.]

Shipowners—Carriers—Limitation of Liability—Injunction—17 & 18 Vict. c. 104, s. 514—25 & 26 Vict. c. 63, s. 54.

A railway company carrying passengers and goods partly by railway and partly by their own ships, is entitled to the limitation on the liability of shipowners imposed by the Merchant Shipping Acts.

A railway company, known to be also shipowners, contracted to carry passengers and goods from London to Guernsey. The passengers and goods were taken by railway from London to Southampton, and were there put on board a ship which belonged to the company. The ship on her way to Guernsey, came into collision with another ship and sank, with several of the passengers and all the goods. Actions were brought against the company by surviving passengers for loss of luggage and for delay, by shippers of goods for loss of goods, and by the administrators of lost passengers for damages:

Held, that, as to all the damages (except those for delay), the liability of the company was, by the Merchants Shipping Acts, limited to the amount of £15 per ton on the tonnage of the ship; that the amount so payable should be distributed by the Court of Chancery, and that all the actions against the railway company (except those for delay) should be restrained.

Order of the master of the rolls varied.

THE London and South Western Railway Company, the plaintiffs in this suit, were by act of parliament empowered to own steam vessels, and to run them between Southampton and Guernsey and Jersey. Ever since the year 1848 the company had accordingly run their steam vessels, and had carried by them passengers, goods, &c., the steam vessels being called by the company and known as the Royal Mail Steam Ships. The 242] company had during this time *been in the habit of advertising the times and places of departure of these steam vessels, and had in the usual manner advertised that they would, throughout the month of March, 1870, run a steam vessel every day from Southampton to Guernsey and Jersey. During that month they issued tickets to persons booking from London to Guernsey or Jersey. These tickets ran, "Royal Mail—Waterloo to Guernsey or Jersey, via Southampton," and stated that the ticket was issued subject to the by-laws, conditions, and rules of the company. They also took goods and merchandize, subject to the by-laws, one of which was, "That in respect to any animals, luggage, or goods booked through by them or their agents for conveyance partly by railway and partly by sea, and partly by canal and partly by sea, the company shall be exempted from liability for any loss or damage which may arise during the carriage of any such animals, luggage, or goods, from the act of God, the queen's enemies, fire, accident from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such conditions."

One of the steam vessels owned by the company was called the Normandy, and on the 16th of March, 1870, she left Southampton for Guernsey and Jersey with a cargo and about thirty passengers. On the morning of the day following she came into collision with another steam vessel called the Mary, and soon afterwards sank. Many of the passengers, with their luggage and effects, and all the cargo of the Normandy were lost; and in cross-suits between the owners of the two vessels, the High Court of Admiralty held the Normandy alone to blame for the collision.

Several actions were commenced against the company; some by passengers for loss of luggage, injury, and delay; some under Lord Campbell's Act, by the administrators of passengers lost; and some by consignors of goods lost. It appeared that in all the cases the passengers and goods had been booked in London, had been brought by the railway to Southampton, and had there gone or been put on board the Normandy.

The High Court of Admiralty, in a cause of limitation of liability instituted by the company, made an order restraining all the *actions on payment by the company into court of [243 the sum of £6376 (being at any rate of £15 a ton on the gross tonnage of the Normandy) and interest. On the 27th of January, 1872, the Court of Exchequer, in the case of one John James, who had commenced an action against the company, adjudged that a writ of prohibition should go to prohibit the judge of the Court of Admiralty from enforcing his injunction; and this judgment was, on the 21st of June, 1872, affirmed by the Court of Exchequer Chamber ⁽¹⁾.

This judgment left the persons who had brought actions, or intended to bring actions against the company in respect of the collision, at liberty to proceed at law against the company. The company thereupon filed the bill in this suit against the owner of the Mary and against several persons who had commenced or threatened to bring actions against the company, stating the facts as above stated, and stating that the collision occurred without the actual fault or privity of the company; that the company, as owners of the Normandy, were entitled to such limitation of liability as in that behalf provided by the Merchant Shipping Act, 1854, and the Amendment Act, 1862; that the company admitted, for the purposes of this suit, their liability to the extent and in the manner mentioned, in the acts as above mentioned, and were willing to pay into court £15 a ton on the gross tonnage of the Normandy, and interest on that sum. And the bill prayed a declaration that the company, as owners of the Normandy, were entitled to the benefit of the limitation of liability under the Merchant Shipping Acts; that the losses and damage in respect of which the plaintiffs were answerable might be determined as the court should direct; and that the defendants might be restrained from proceeding in their suits or actions against the company.

The company moved before the master of the rolls for an injunction. Some only of the defendants were served — James, who claimed damages for loss of luggage and delay, and who denied that he had any notice of the by-law or of what vessel he was to go by; Messrs. Milburn and their trustee in bankruptcy, who claimed damages for loss of merchandize sent; and Mrs. Jackson, whose husband had been lost, and who, as administratrix of her *husband, claimed, under Lord Campbell's Act, damages for the loss, and also for the loss of 350 sovereigns which her husband was said to have had with him. The company had allowed judgment in all these cases to go by default, but the damages had not been assessed.

(1) Law Rep., 7 Ex., 287.

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L. C. & L. J.

The master of the rolls granted an injunction against all the defendants except James; those defendants being at liberty to have their damages assessed but not to levy them⁽¹⁾.

⁽¹⁾ 1872. July 15. LORD ROMILLY, M.R., after stating the facts of the case, continued: In this case several important questions have to be considered. It must be borne in mind that the railway company, besides being owners of the vessel, entered into a special contract with Mr. James, which is wholly independent of the question of maritime law. They themselves fill a double character: they are carriers by land, and they are at the same time owners of the ship *Normandy*; and in my opinion these two characters must be kept quite distinct.

With respect to all actions brought against the owners of the ship for loss sustained by mismanagement of the ship, the total loss is limited to £15 per ton. And in the case of *Glabholm v. Barker* (34 Beav., 305), I held, and the lords justices affirmed the decision (Law Rep., 1 Ch., 223), that this limitation was extended to any action brought under Lord Campbell's Act for the loss of life caused by the mismanagement of the ship. This, therefore, would cover the case of Mrs. Jackson so far as regards the damages in respect of the loss of her husband. Whether it would cover the £350 which he had with him is open to another question, which I will presently mention. It also, of course, includes the loss of goods in respect of which Messrs. Milburn and their trustees have made a claim, because this was a damage occasioned by the loss of the vessel itself. It will also include the loss sustained by the owners of the *Mary*. Whether it includes the claim of the defendant James appears to me to depend on these considerations. He sues the railway company on a special contract, which he says was broken, whereby he has sustained a loss quite distinct from any damage for which the owners of the ship may be liable. An action would lie against them, supposing they were not the owners of the ship: and in that case I have to consider whether they could claim the benefit of an enactment applying only to the owners of the ship, and aver that the plaintiff who sued them at law had his remedy against the owners of the ship for the loss sustained, and therefore could not

sue the company. I can easily suppose that two actions for different matters might in that case be against different persons. Suppose that the company contract to carry goods to Guernsey, and that they fail to do so by reason of the loss of a vessel in which they have no share, and with the management of which they have nothing to do—suppose that by the same vessel the father of the consignor of the goods is drowned, and that the consignor brings, under Lord Campbell's Act, an action against the owners of the vessel for the loss sustained by him by the death of his father—would this stop his suit against the company? I am of opinion that it would not. Nor if they were owners of the ship could they merge both actions together, and say that, having an interest in the ship, the act limits the liability upon both losses to the £15 per ton. Their character as defendants to the action for breach of contract is distinct from that of shipowners: and if James had the option of suing whichever he pleased, and elects to sue them as a railway company, the fact of their filling both characters does not give them a better right, and they are not able to contend that their liability is limited to the £15 per ton.

This also raises the question, whether they had given him notice that they were not to be liable for any damage by sea. Now I am of opinion that this notice rather applies to a case where they are not the owners of the vessel, than to one where they are the owners of the vessel; and that if a person takes another vessel the railway company does not undertake that their contract shall govern the conveyance by the vessel over which they have no control, and that it would be difficult to say that this notice applied to the vessel of which they are the owners.

But, however this may be, I am of opinion that no such notice was given to Mr. James, and it does not appear that any species of information was given to him that the railway company refused to be liable for any losses sustained by sea.

With respect to Mrs. Jackson this question also arises: Her husband, as I understand, carried 350 sovereigns, and

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*The company appealed. The appeal was opened before the lords justices, who thought that it ought to be heard by the full court, and it now came on accordingly. [245]

*Sir R. Baggallay, Q.C., Mr. C. W. Wood, Q.C., and Mr. [246] *Locock Webb*, for the company: There are two questions on this appeal, one as to the case of James, the other general, whether the defendants ought not to prosecute their claims in this court instead of going to a jury. The damages to be paid are limited by the Merchants Shipping Act, 1854 (17 & 18 Vict. c. 104), and the Amendment Act, 1862 (25 & 26 Vict. c. 63). Limitations were created by the first act, sects. 503, 504, and 505, and jurisdiction was given to this court by sect. 514 (1). The present

she claims this as against the company. The company say that, as regards the carriage of gold, they, by their by-laws are not answerable unless the carriage of the gold is given notice of to the company, and the proper insurance is paid. In this case I am not at all clear whether notice of this by-law was given or not, I have no evidence at all on the subject, or how this notice was given, whether it is one of those by-laws which is, printed and given notice of to everybody; and therefore I wish to keep that as a separate and distinct matter.

With respect to the action of Mr. James, I am of opinion that it should be settled at once: and I am of opinion that the limitation under the Merchant Shipping Act does not bind him, and that he is at liberty to sue the railway company under a separate and distinct contract, and therefore as regards him I shall refuse the motion with costs; but as regards all the others I shall grant an injunction to restrain the levying of execution; but I think it would be shorter and more simple if the amount of damages in each case were ascertained at law instead of in chambers.

I propose, therefore, to stay the execution of the judgment, that is to say the levying of the damages, until I have ascertained what is the amount of the claims against the fund, and to restrain any other actions. The costs of the defendants, except James, will be costs in the cause. I have never known whether it was determined that the amount to be divided is to be divided with reference to the debt alone or to the debt connected with the costs. That is a question which will arise hereafter, and I wish the amount of Mrs. Jackson's dam-

ages to be ascertained independently of the sovereigns which her husband carried. In other respects, the costs of the motion will be costs in the cause, and of course there will be no injunction against the other defendants who have not appeared, and have not been served.

(1) Sect. 514 of 17 & 18 Vict. c. 104, is as follows:—In cases where any liability has been, or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then, subject to the right hereinbefore given to the Board of Trade of recovering damages in the United Kingdom in respect of loss of life or personal injury, it shall be lawful in England or Ireland, for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession, for any competent court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability, subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants; with power for any such court to stop all actions and suits pending in any other court in relation to the same subject-matter; and any proceeding entertained by such Court of Chancery or Court of Session, or other competent court, may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants, who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the court thinks just.

limitations are contained in the act of 1862, s. 54 ⁽¹⁾, sects. 504 and 505 of the former act being repealed.

247] *We say that James took his ticket for a journey partly by land and partly by sea, and we contend that the contract is what has been called divisible, so that as to the sea portion his rights came under those acts. The converse was decided in *Pianciani v. London and South Western Railway Company* ⁽²⁾; *Le Conteur v. London and South Western Railway Company* ⁽³⁾. But it is not quite accurate to say that the contract is divisible, and the true reason of the decisions was that the company were carriers by land and carriers by sea also. No doubt difficult cases might arise upon these acts, or might be put, but there is no difficulty about this. The company have power to carry by land and to carry by sea under the laws applicable to each.

Then as to the general question: Assuming the liability of the company to be limited, it will be very inconvenient to allow these claimants to prosecute their claims separately at law. The company will be the defendant in each case, and will have no interest in keeping down the damages, which will only affect the other claimants. Moreover, if necessary, the court may direct any case to be tried before a jury. Lord Campbell's Act (9 & 10 Vict. c. 93) does not make the decision of a jury necessary. As to the merchandise lost, it was not necessary to put on the ticket or to make any special contract that the company claimed the benefit of the Merchant Shipping Acts: *Baxendale v. Great Eastern Railway Company* ⁽⁴⁾. Still we say that the defendants must be taken to have had notice of the ownership of the vessel and of the terms under which the company were carriers.

248] *Mr. C. T. Simpson, Q.C., and Mr. W. G. Harrison, for

⁽¹⁾ Sect. 54 of 25 & 26 Vict. c. 63, is as follows: The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

- (1) Where any loss of life or personal injury is caused to any person being carried in such ship;
- (2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;
- (3) Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat;
- (4) Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods,

merchandise, or other things whatsoever on board any other ship or boat; be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine room.

⁽²⁾ 18 C. B. 226.

⁽³⁾ Law Rep., 1 Q.B., 54.

⁽⁴⁾ Law Rep., 4 Q.B., 244.

the defendant James; Our client brings his action for breach of contract simply; the company have admitted this, and they have suffered judgment to go by default. The limitations of the Merchant Shipping Acts do not, therefore, apply. If any one contracts to carry me, and hires a vessel in which part of the journey is performed, and in which I am injured, my damages are not to be limited. My damages are not recoverable under the Merchant Shipping Acts, and this court ought not to interfere. At all events, as to the delay, the action at law cannot be affected by any limitation. I have nothing to do with the other persons damaged. Is each of us to be allowed to contest the claim of each of the others? Who is to pay the costs? It is not admitted that the company will pay them. How can damages be assessed, having regard to the claims of others? If the vessel had belonged to some one else, how would it be. If the theory of the plaintiffs is correct, strange consequences would follow, and it would make a great difference if a carrier sends goods by water instead of by land. The limitations of the Merchant Shipping Act apply only to a shipowner. An underwriter's liability is clearly not so limited. Suppose that the company had entered into a contract of insurance as to these goods, then their liability as insurers would not be limited. The company have contracted as common carriers, and have rights and liabilities as such. If the passenger had paid his fare separately on board the steam vessel the case might be different, as he would then know that he was contracting with the shipowner. If another railway company had issued the ticket, that company would clearly be liable: *Wilby v. West Cornwall Railway Company* ⁽¹⁾.

Mr. Bathurst, for Messrs. Milburn, consignors of goods, who had become bankrupt, objected to being made parties.

Mr. R. Roberts, for a partner with Messrs. Milburn.

Mr. Openheim, for Mrs. Jackson, claimed the right of having the damages assessed by a jury, and contended that the case did not come under the Merchant Shipping Acts: *Smith v. Brown* ⁽²⁾.

*Mr. Miller, Q.C., for the owners of the *Mary*, asked for 1249 their costs of the proceedings before the Court of Admiralty: *African Steam Shipping Company v. Swanzy* ⁽³⁾.

Sir R. Baggallay, in reply: The 514th section of the Merchant Shipping Act gives this court jurisdiction in all cases of damage at sea: *Glaholm v. Barker* ⁽⁴⁾. Lord Campbell's Act was law at that time, and the legislature must have intended cases under it to be within the jurisdiction of this court.

The company are as much shipowners as railway owners,

⁽¹⁾ 27 L. J. Ex., 181.

⁽²⁾ Law Rep., 6 Q. B., 729.

⁽³⁾ 4 W. R., 692.

⁽⁴⁾ Law Rep., 1 Ch., 228.

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and in fact are sued as such. The defendants must have known this, and must have known that the vessels of the company were to be used, and made their contracts on that understanding. The acts may not be perfectly clear, and cases may be put where it would be difficult to discover the meaning; but here there is no difficulty, and the court is bound to apply the act. The plaintiffs are willing, if the court thinks it should be done, to pay the costs of the injunction.

LORD SELBORNE, L.C. : We all think that the proper course will be to grant the injunction upon the terms that the plaintiffs shall pay the costs, including the costs of the appeal.

With regard to the main question in the case, it will, of course, be understood that, so far as Mr. James is concerned, it relates only to that particular kind of loss and damage which is within the language of the act — that is to say, the loss of his luggage; but the principle applies to all goods lost by any persons whose goods were being carried on board this vessel.

It has been but faintly, if at all, argued that the limitation of liability imposed by the Merchant Shipping Acts has no application to the cases of persons and goods carried by the shipowner as a carrier. Mr. Harrison did, indeed, suggest the possibility of putting this limited construction, which would exclude every case in which the shipowner was the carrier; but we think it manifest that the ordinary case, or at least one 250] of the most ordinary cases, in all *contracts of affreightment, is, that of the shipowner carrying on board his own ship. The corresponding term, "carriage," occurring in the 505th section of the act of 1854, with what is there said about freight, appears to me to show that the ordinary case was not excluded, and that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief intended to be given to the owner; nor is this inference rebutted by the subsequent repeal of this section.

Then, supposing that to be so, I do not understand that it was ever contended that if this particular contract had been in terms to carry by railway to Southampton, and from Southampton by the ship *Normandy*, belonging to the railway company, to Jersey or Guernsey, the limitation of liability would not have applied. But it is not the ordinary course in a contract of freightment or in a bill of lading to state upon the face of the instrument is whom the ship belongs. It cannot, therefore, have been the intention of the legislature to make that necessary in order to give the relief to the shipowner, when the shipowner was both the carrier and the person liable.

In this particular case the shipowner was in fact both the

carrier, and the person liable; but if it be material to go further and see whether the persons who or whose goods were conveyed, actually with their own knowledge entered into a contract for conveyance by one of the company's own vessels—if, I say, it be material, then it appears to me that the just and proper inference to be drawn from the facts, which are not in dispute, is, that this was the case. For a long course of years the company had, under lawful authority, been carrying passengers from Southampton by their own steam vessels, of which this was one; nor is it suggested that they ever carried in any other manner. They had for many years issued public advertisements as to the times and places of departure of their steam vessels and so forth: and although it might be possible that they might fulfill their contract otherwise, yet, *prima facie*, and in the natural course of things, it was rather to be presumed that they would do so by their own vessels than otherwise. Any one dealing with them is, I think, rather to be taken as believing and knowing that to be the actual course of business. We find further that the term "Royal Mail Steam Ships" is, as I *understand, proved to be the term by which the company's [25] steam-vessels which carry the mails of the crown were called and commonly known. This vessel was one of them, and upon the face of the ticket in this case were the words "Royal Mail," showing that the contract was to carry the passenger by the mode of conveyance known by that term. It seems to me to be exactly the same thing as if the particular ship had been mentioned. It is hardly necessary to carry it to the next step farther, which is this, that, as a matter of fact, both the passenger and the company concurred in the fulfillment of the contract by one of the company's own vessels.

It appears to me, therefore, that it is a case of a claim against the carrier as owner, and thus within the plain meaning of the act.

For this reason, I am of opinion that, as far as the principle is concerned, the appellants are right, and that, as far as the particular case of the loss of life is concerned, the 514th section of the act of 1854 shows plainly that it was intended to give this court full jurisdiction in such cases. That jurisdiction is to extend not only where there has been an ascertained liability in respect of loss of life, but where such liability is alleged to have been incurred. And, again, where it might be, not known but apprehended only, that other claims of the same sort might arise, power is given to the court to determine the amount of liability, and also to suspend all questions and suits pending in any other court in relation to the same subject matter, and to

do this in such manner and subject to such regulations as the court may think fit.

Is there, then, any reason of practical convenience which makes it better to direct that actions shall proceed in all these cases of loss of life — any reason which makes that more convenient than to refer the whole matter for inquiry in chambers, where it will be ascertained in how many of those cases there is a real contest which may require a decision, it may be with the aid of a jury, or it may be without? Upon that subject I say nothing at present. But I understand that the experience acquired in the case of *Glaholm v. Barker* ⁽¹⁾ has shown that similar claims may be all settled in chambers without incurring much further expense.

252] *It appears to me that the wiser and the better course will be to refer the whole matter for inquiry in chambers, it being entirely in the power of the court, if it should eventually appear necessary, to determine any question by taking the opinion of a jury.

SIR W. M. JAMES, L.J. : I am of the same opinion. I think it right merely to add that the difficulty which pressed on me when the matter was partly argued before us as lords justices, has been satisfactorily removed by an observation of Sir Richard Bagallay. It may be possible, as he observed, to suggest hypothetical cases, in which it might be difficult or impossible to apply the act, but I agree that this is not the legitimate mode of ascertaining the construction of an act when the case is clearly within the words and the meaning of the act. I am now satisfied that the act does apply, both in words and in spirit, to the case actually before us.

SIR G. MELLISH, L.J. : I am also of the same opinion ; and I think that the case clearly comes directly within the words of the act. The London and South Western Railway Company were the owners of the ship *Normandy*, and they are sued by Mr. James for damages on account of the loss of goods which were being carried on board that ship. The case being directly within the words, it ought to be held within the act, unless it is clearly not within what was the scope and intention of the legislature in passing the act. But what was the scope and intention of the legislature in passing the act? Ever since the reign of George II, there has been a limitation on the liability of the owners of ships. It has been thought a matter of public policy to encourage persons to embark their capital in ships by limiting the liability to be incurred by the loss of goods ; and this, previously to Lord Campbell's Act, was the principal liability.

(1) Law Rep., 1 Ch., 223.

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It was thought expedient to limit the liability, because a ship might carry gold, or goods of great value, and then, from some trifling act of neglect on the part of the master, or on the part of the man steering the vessel, the shipowner might be made subject to enormous liability. On that account the legislature thought it was for the public *advantage that there should [253 be this limit on the liability of the owner. Why should not that apply to the case before us? The London and South Western Railway Company are encouraged by that limitation of liability to embark, as shipowners, in the trade of carrying passengers and goods between Southampton and Jersey, and I do not understand what the grounds are upon which it is said they are not to avail themselves of the limitation. The ground put by the master of the rolls is simply that the passenger took a through ticket from London to Jersey. It was admitted that if the passenger had taken a ticket from London to Southampton, instead of from London to Jersey, and when he got to Southampton had walked on board the ship and had gone as a passenger to Jersey, then he would be subject to the limitation. But what possible object can there be in holding that, in order that the company may avail themselves of the limitation, it shall be necessary to deprive all their passengers of the convenience of paying for their ticket at one time, instead of paying on two different occasions? Such a decision would not deprive the company of the benefit of the act, and would only put the passengers to inconvenience. In my opinion the case is both within the words and within what I think was the spirit of the act.

THE LORD CHANCELLOR afterwards explained that as to James the injunction would extend only to his claim for loss of luggage or goods.

Solicitor for the plaintiffs: Mr. *L. Crombie*.

Solicitors for the Defendants: Mr. *J. Rae*; Mr. *Franklyn*; Mr. *W. R. Philp*; Mr. *Joel Emanuel*.

As to similar act of Congress, see 1 Brightl. Dig., 834, § 49; 9 St. at Large, 635, § 1; 2 Am. Law Reg. (O.S.), 157; *New Jersey etc. v. Merchants, etc.*, 6 How. U. S., 344; *Walker v. Trans. Co.* 8 Wallace 150; *Moore v. Trans. Co.*, 24 How. U.S., 1.

The exemption applies to a passenger's baggage. *Chamberlain v. Western*

Trans. Co., 44 N. Y., 305, reversing 45 Barb., 218. But it does not apply to goods after they are landed on a wharf. *Salmon Falls, etc. v. Tangier*, 6 Am. Law Reg., (O.S.), 504. The act applies to vessels navigating Long Island Sound. *Knowlton v. Providence, etc.*, 33 N. Y., Superior Court Reports, 370.

[Law Reports, 8 Chancery Appeals, 254.]

L.C. and L. JJ., Dec. 11, 1872.

254] *In re PARAGUASSU STEAM TRAMROAD COMPANY. BLACK & CO.'S CASE.

Company—Winding-up—Calls—Set-off.

In winding up a company, debts cannot be set off against calls.

A contractor agreed with a company to supply them with steam engines at a fixed price, and to take shares in the company, payment of the calls on which should not be enforced until at least two engines should have been paid for, and the contractor might set off against the calls the money due to him. The contractor took shares accordingly, and made two engines for the company, which were not taken by the company or paid for. The company was afterwards ordered to be wound up by the court, and a call was made by the liquidator:

Held (reversing the decision of Bacon, V.C.), that the contractor could not set off the amount due to him from the company under his agreement as damages or otherwise against the amount due by him on the calls.

Brighton Arcade Company v. Dowling (1) disapproved of.

On the 20th of October, 1868, Messrs. Black & Co., engineers, made an agreement with the Paraguassu Steam Tramroad Company for the supply of locomotive engines to the company on the following terms: That Black & Co. would, for ten years, make all locomotive engines which the company should require, at £1100 for each engine, to be paid as therein provided. That during each of the first five years the company would accept at least four of such engines, and during each of the next two years two of such engines. That the first order was to be for two engines. That all engines should be paid for when the delivery notes of the same were presented at the offices of the company. That instead of paying cash the company might give acceptances as therein provided. That Black & Co. would, by themselves or their nominees, subscribe for at least 198 £20 shares in the company, and would pay £6 on each share, being the amount of calls then made; and that no further payment of calls should be enforced in respect of such shares until at least two engines should have been paid for in the manner thereinbefore provided; and during the continuance of this agreement Black & Co. might set off against the calls upon all or any of the said shares 255] the *amount which was due to them or for which they held the company's acceptances. That the company should pay, by way of liquidated damages, the sum of £500 for each engine which they should order and not accept.

Black & Co., in execution of this agreement, duly applied for and were allotted 198 shares, and paid £6 on each; and they were duly registered as shareholders. They then made two

(1) Law Rep. 8 C. P., 175.

engines, and on the 6th of July, 1869, wrote to the company to say that they were ready. They received an answer that, pending advices from Brazil, the directors were anxious not to send out any engines. Black & Co., were not able to induce the company to take the engines, which remained in the hands of Black & Co.

On the 22d of January, 1870, an order was made for winding up the company by the court. An official liquidator was appointed, and a call of £12 a share was made.

Black & Co., who had been placed on the list of contributories in respect of the 198 shares, claimed to be creditors of the company for, 1, the sum of £2200 and interest for the two engines made, and a sum of £38 for the cost of warehousing them; and, 2, £500 liquidated damages for each of twelve other engines not made, but, as they contended, ordered; and they claimed to set off these sums against the call made on them. They produced evidence that the engines could not be disposed of, being of an unusual gauge, and that they had gone to the expense of machinery on purpose for making these engines.

The matter came before the Vice Chancellor Bacon on summons, and his honor made an order that Black & Co., were entitled to set off against the call, £1000 as liquidated damages for the two engines actually made, £10 for interest thereon, and £38 for the cost of warehousing the engines; and that Black & Co., were to be at liberty to prove for other damages by reason of the non-performance of the agreement by the company, and to set-off the sum so proved against the amount payable by them under the call (?).

The company appealed.

**Mr. Eddis*, Q.C., and *Mr. Jackson*, for the appellants: [256] We say that calls cannot be set off against debts unless the contract to do so is registered under the Companies Act, 1867 (30

(?) 1862. Nov. 7. SIR JAMES BACON, V.C., said that he did not think the 25th section of the Companies Act, 1867, and still less the decision of the Vice Chancellor Wickens in *Cleland's Case* (Law Rep., 14 Eq. 887), had anything to do with the matter before the court. The statute prohibited the allotting of shares on any other terms than those of payment in cash; but that prohibition did not apply to this case. This was an allotment of shares, and they were to be paid for in cash. There was no necessity for any registration of such a contract. The contract constituted by the allotment of the shares was a contract for the payment of money in respect of the shares. The

question was, whether it was competent to the company, who were entitled to allot the shares and entitled to exact the payment for them in cash, to stipulate that when that payment in cash came to be made, then, by reason of other transactions between the parties, the amount of the debt due to the company should be set off against the payment in cash. His honor did not find that *Cleland's Case* touched that question in the slightest degree. In *Cleland's Case*, a man to whom (let it be assumed) a debt was due, agreed to cancel that debt if the company would give him shares which he should not be required to pay for in cash. That was as directly in the teeth of the act

257] & 31 *Vict. c. 131, s. 25): *Grissell's Case* (¹). In *Brighton Arcade Company v. Dowling* (²) the company was voluntarily wound up, and, moreover, the debt was subsequent: *Cleland's Case* (³). In some cases, such as *Elkington's Case* (⁴), the company got the equivalent of cash: here they got nothing. The public are entitled to know that the whole capital called up actually comes to the hands of the company, either in money or in money's worth. Here the only claim of Black & Co. is for a tort committed by the company in not taking and paying for these engines. It is the very mischief which this clause in the act is intended to prevent. The rules in bankruptcy do not prevail in winding up.

Mr. Kay, Q.C., and Mr. Higgins, Q. C., and Mr. C. Hall, for Black & Co.: We only took our shares on the faith of this agreement, and if the company is not bound by the agreement, we are not bound to take the shares, and ought to be struck off the

of parliament as anything could be; but in neither of the subsequent cases, nor in any of the observations made by the Vice Chancellor Wickens, was there anything which resembled or referred to a case like this.

The directors were perfectly at liberty to enter into this contract—a perfectly just, proper, and business like contract. There was no money to pay with, and they entered into the contract with manufacturers for the supply of engines which were absolutely necessary for the accomplishment of the object of the company, agreeing to pay certain moneys at certain times in a certain way, and stipulating that the contractors should take shares in the company. There was a further stipulation that the company would not call upon the contractors for the payment in actual cash, and that if the company owed the contractors any money they should be at liberty to set it off against the cash due for the calls. What was there unreasonable in that? How did *Grissell's Case*, or any other case which had been cited, affect the question. It was a plain, simple, and honest contract, as to which his honor saw no difficulty whatever.

To the extent of the liquidated damages there was a clear right of set off.

The unliquidated damages stood on a different footing. His honor agreed with Black & Co., that they might set off against the calls upon all or any of the shares the amount due to them or for which they held the company's acceptances; but the amount due to

them could only be ascertained and become due from the company when a jury, if it went to a jury, had determined the amount of the unliquidated damages to which they are entitled.

The £500 could not be taken as the right sum for damages.

After having heard further argument on this point, his honor came to the conclusion that there must be an inquiry as to the amount of the unliquidated damages. The evidence was that Black & Co. had made preparation for the execution of these orders, and had sustained a loss in consequence of not completing them, and they would probably have a right to compensation for the loss which they had sustained by reason of their not being able to complete their engines, and by reason of the default of the company in taking the whole number of engines. *Grissell's Case* had decided that for any debt a shareholder could not, in the absence of special agreement, set off any call, but must come in and prove as a creditor. The 158th section of the act of 1863 provided for all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages; and the 25th Rule of the Gen. Ord. of 11th November, 1863, provided for valuing the claim as at the date of the order to wind up, the meaning of which was that there should be no after-claims.

(¹) Law Rep., 1 Ch., 528.

(²) Ibid., 3 C. P., 175.

(³) Ibid., 14 Eq., 387.

(⁴) Ibid., 2 Ch., 511.

list: *Alabaster's Case* ⁽¹⁾. At all events, we ask to set off the sums due to us at the date of the call. At law we should have a right to set off the sums actually due to us, and the winding up acts make no difference in the legal rights of the shareholders and creditors, but only in the mode of administering these rights. The 98th and 103d sections of the Companies Act, 1862, do not interfere with any rights which shareholders may have. The only alteration is, that the liquidator takes the place of the directors. It is not true that *shareholders must always [258 pay: *Elkington's Case* ⁽²⁾; *Pellatt's Case* ⁽³⁾. The case of unliquidated damages is expressly provided for by sect. 158 of the act of 1862. It is not pretended that the agreement was not valid and within the powers of the directors; and the act of 1867, with the exception perhaps of the 25th section, actually extends the powers of the directors: *In re Baglan Hall Colliery Company* ⁽⁴⁾. If the directors had given Black & Co. a mortgage on the calls, that would have been valid, and this is exactly the same. The agreement to take shares was part of the original agreement, and the company cannot hold Black & Co. to one part of the agreement and repudiate the other part. Whatever may be the case as to the damages for the other engines, the right of Black & Co. as to the two engines made is undeniable.

LORD SELBORNE, L.C.: The argument of the respondents has extended to two points, one of which was and the other was not the subject of the decision of the vice chancellor.

I propose first to advert to that point which was not the subject of decision by the vice chancellor.

It has been argued that unless the respondents are entitled to the set-off which they claim, they are entitled to be entirely exonerated from the liability of shareholders, and to have their names taken off the list of contributories. For that contention I can find no ground whatever, the facts being simply these: [His lordship then stated the facts of the case.] I should have thought, until I heard this argument, that it was much too late for any one to suggest that in a question with creditors, a registered shareholder could possibly be taken off the list on the ground of anything contained in such an agreement as that of the 20th of October. That is not the contract between himself and the company under which he was constituted a shareholder, but is a collateral and preliminary contract, though no doubt made in the expectation of his becoming a shareholder in consequence of the arrangement then made. The case of *Onkes v.*

⁽¹⁾ *Ibid.* 7 Eq., 273.

⁽²⁾ *Law Rep.*, 2 Ch., 511.

⁽³⁾ *Ibid.*, 527.

⁽⁴⁾ *Law Rep.*, 5 Ch., 846.

Turquand ⁽¹⁾ decided that when a man has, under the 123d section of the act of *1862, with his own consent, become fully a legal shareholder by registration of shares which he has agreed to take, equities which might be good as between the shareholder and the company cannot, after a winding up, be set up against the creditors of the company. In this case, putting the argument of Mr. Kay and Mr. Higgins at the highest, it would be simply this, that we ought to set up an equity to rescind and avoid the contract for shares, on the ground that the consideration for that contract had more or less failed. In *Oakes v. Turquand* the house of lords held that down to the very day of the winding up, that is to say, the day which is to be considered under the act of parliament as the commencement of the winding up, the contract was voidable at the option of the parties. But they further decided, that that option not having been exercised so as to avoid the contract before winding up, it then ceased to be capable of being avoided as against creditors; and putting the argument of the respondents at the highest, it could not be carried beyond that point. This is a question with creditors, and creditors only, and it arises after the winding up, no attempt having been made to have their names withdrawn from the register before the commencement of the winding up.

Pellatt's Case ⁽²⁾ has really no application whatever. There, according to the view the court took of the facts, the liability of the alleged contributory to be treated as a shareholder rested *in fieri*. There had been no registration of him as a shareholder with his consent, and there can be no doubt that in that state of things creditors can have no better right than the company to the specific performance of an unexecuted contract with a person whose name is not duly upon the register. In those cases, what is a defense against the company is a defense against the creditors, because the alleged contributory is not a member, and cannot be made so except upon the terms of the contract, if any, by which he has agreed to become one.

Elkington's Case ⁽³⁾ is, in its circumstances, very similar to *Pellatt's Case*, with the exception that there Messrs. Elkington had, besides making the original agreement, at the same time applied for shares, had received notice of allotment, and had been registered in due course as shareholders. That case was 260] decided the other way, and it was held that, being complete legal shareholders, they could not, as against creditors, be released on the ground of anything collateral which might be contained in any other agreement. *Stace and Worth's Case* ⁽⁴⁾

⁽¹⁾ *Ibid.*, 2 H. L., 325.

⁽²⁾ *Law Rep.*, 2 Ch., 527.

⁽³⁾ *Law Rep.*, 2 Ch., 511.

⁽⁴⁾ *Law Rep.*, 4 Ch., 682.

has no application at all. There the shares, in respect of which alone the man could be made a shareholder, were held not to be well created.

I pass, therefore, from that portion of the case, and now come to the other. The vice chancellor has here held, apparently upon the ground that an agreement had been made between the parties expressly to that effect, that calls made in the winding up, and under the powers of the act of parliament, should be set off against the debt claimed by the shareholders, who are also creditors of the company. His honor has gone further, and has said that this doctrine applies not only to the debt, but also to any unliquidated damages in respect of a breach of contract to be ascertained under the winding up; and he has held that calls might be set off because there was a special agreement to that effect, though this is not merely a voluntary winding up (if that would make any difference), but a winding up by the court. The point, therefore, which his honor has decided is simply this: that a company may contract with one of its shareholders, so as to take him, in case of a winding up, out of the law laid down in *Grissell's Case* (¹), and give him, in substance, a right to be paid out of his own calls in preference to other creditors; which right, but for such special contract, he would not have had. It is probably enough to say that the law generally has been settled by *Grissell's Case* upon the interpretation of the act of parliament, and of the rules laid down in that act of parliament, as to the mode in which, under a winding up, the money arising from calls is to be applied in payment of the debts of the creditors, *pari passu*, and without reference.

That case (being decided by an authority which we ought to treat as binding on ourselves, even if we doubted that it was right) has determined that in general such a set off is not to be allowed. That decision being founded upon the interpretation of the act of parliament, it is very difficult to understand how it can be seriously argued that a company and one of its shareholders can, by any agreement they choose to enter [261] into between themselves, override, and relieve themselves from the operation of the act of parliament. The principle of the winding up enactments is like that of the Bankruptcy Acts. It is a particular statutory mode of doing justice between the members and the creditors of companies which have ceased to carry on business, and which, generally speaking, are insolvent. It is to be observed that, if the company is not insolvent, the law laid down in *Grissell's Case* (¹) will do the shareholder no harm, because, if there is a surplus after paying all the debts in full, of course his debt will be paid among the rest, and the right of

(¹) Law Rep., 1 Ch., 528.

set off will not be wanted to do justice between him and the other shareholders. That being so, it is impossible to entertain the idea that, if the law is as laid down in that case, any company can, by any private contract, take a particular creditor, who is also a shareholder, out of the operation of that law unless the contract comes within the permissive portion of the 25th section of the act of 1867. But in this case the course prescribed by that section has not been followed, and I do not propose to say more on the subject, except that I greatly doubt whether that act does not supply additional reason against holding that the set off in this case can be allowed.

I think it right, rather in consequence of what was said by the Court of Common Pleas in the case of the *Brighton Arcade Company v. Dowling* ⁽¹⁾ than for any other reason, to observe that I entertain no doubt whatever that *Grissell's Case* was decided on the soundest principles. What is the ordinary law of set off? It is what in the civil law was called compensation, and simply means this: that when you have got two cross demands of a nature substantially the same, and due to and from A. and B. in the same right, that is to say, when the one is a creditor in his own right and debtor also in his own right to the other, the one debt may be set off against the other at the option of the party from whom payment is demanded. But it is essential in such cases that the rights should be substantially the same. If they were apparently the same at law but different in equity, set off would not be allowed here; nor do I suppose that, in the present state of the law, it would be allowed [262] at common law either. But here the rights *are substantially different. The moment that the winding up takes place, the whole administration is carried on with a view to the payment of the debts of the creditors, and in the first instance to payment *pari passu*. The different sections of the act — those which define the liability of limited companies, the 7th, 8th, 23d, and 38th — those which deal with the administration of assets, the 98th, 101st, and 133d — those which give the power to make calls, not in the ordinary way, but specially for the purposes of this act, the 102d and 133d — all have in view the payment, *pari passu* and equally, of the debts due to the creditors; and the hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors. The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would, in effect, be to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts

(1) Law Rep., 8 C. P., 175.

of the other creditors. That appears to me to be utterly opposed to the whole principle of the law of set-off, and to all the provisions of the act which bear on the subject.

As the case in the Common Pleas substantially is not before us I think it wiser and better not to say more on that subject than this: that, although recognizing the soundness of *Grissell's Case* ⁽¹⁾, when the winding up is by the court, or voluntary under the supervision of the court, and professing not to depart from it, the Court of Common Pleas has thought it inapplicable to a case of voluntary liquidation where the court has not intervened; and, in order to arrive at that conclusion, has certainly shaken, by some of the observations made, a portion of the foundation for the conclusion in *Grissell's Case* — I mean that part of the judgment of Lord Chelmsford which relates to the 133d section. The Court of Common Pleas apparently thought that a voluntary liquidation under the act is a matter in which the shareholders merely are concerned. Whenever that subject shall be required to be reviewed and further considered, I hope attention will be paid to several sections in the act, to which, as far as I can see, attention was not particularly directed on that occasion. I own that I am rather at a loss to see how that application of the *assets in payment of all the debts *pari passu*, which the 133d section expressly requires, can be made if one creditor is to retain the whole of his debt out of his calls in a way which will give him a preference over others. Yet that section is one which expressly applies to every voluntary liquidation; and if it should be said that creditors have no interest in a voluntary liquidation because the company may be presumed to be solvent, I hope, whenever that question comes to be considered again, attention may be directed to the third branch of the 129th section, which shows that the pecuniary difficulties of the company are contemplated as one of the reasons for voluntary liquidation. I hope attention will also be directed to the 135th section, which, in a case of voluntary liquidation without reference to supervision, enables the meeting to delegate the liquidation to its creditors; also to the 152d and 161st sections, which, in cases of voluntary liquidation, enable a majority of creditors to bind the minority by an arrangement which they make with the liquidators. Attention should also be directed to the 158th section, which introduces new rules as to proveable debts and liabilities, which are equally applicable to the case of voluntary liquidation; and, further, to the 138th section, which introduces in those cases, if an application is made to the court, all the power which the court would have in a case where it was itself winding up the

(1) Law Rep., 1 Ch., 528.

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company. This, in my judgment, would include, if proper applications were made, the power to allow a set off in certain cases and not in others, as specified in the 101st section, and also the power to stay the actions of creditors.

I have thought it right to say so much, because it does seem to me a matter of great importance that a distinction tending to introduce different principles of administration, so far as creditors are concerned, between the cases of voluntary winding up and winding up under supervision or by the court, may not be finally established unless it be on very full consideration of everything in the statute that is material. It does not seem to me, I confess, a very satisfactory mode of arriving at such a distinction to say that the creditors may always go to the court and get an order for supervision or for a compulsory winding up, and that if they do not they may be considered as having no substantial [264] interest *in what is going on. This court has on many occasions shown a great disposition to encourage and support, as far as may be right and proper, the practice of voluntary winding up. If creditors under a voluntary winding up are in substantially a different position, there are probably very few cases in which it would not be expedient for them to induce the court to interfere. If they are entitled fully to the same rights, they probably will not think it necessary to apply to the court unless there is some reason to distrust the way in which the affairs are being conducted. Here, however, that point is not before us, because this is not the case of a voluntary winding up. The circumstances are exactly those which happened in *Grissell's Case* ⁽¹⁾. It is, in fact, that case over again.

I am clearly of opinion that it is not competent for any persons whatever, by any antecedent contract, to alter the administration of the assets of the company under such a winding up. I am not at all sure that, on the construction of this particular contract, it is necessary to hold that there has been any attempt to do so; but even if there was an attempt, my judgment would be that that attempt is necessarily ineffectual, because it would be an attempt, by private agreement, to get out of and override an act of parliament.

SIR W. M. JAMES, L.J. : I am of the same opinion; and I desire it to be understood that I concur in the doubts which the lord chancellor has expressed whether the case in the common pleas can be reconciled with *Grissell's Case*.

SIR G. MELLISH, L.J. : I am of the same opinion. The effect of the 38th section of the act of 1862 is clearly to make every person who is at the time of the winding up a shareholder,

(1) Law Rep., 1 Ch., 528.

liable to contribute to the debts of the company, that liability being limited to the amount unpaid upon his shares. If there be an amount which at the time of the winding up is unpaid on his shares, then he is liable to contribute that amount towards payment of the debts of the company.

*In the present case that was plainly the position of [265 Black & Co., at the time when the winding up order was made. Then the 98th section says that the assets, which clearly include the unpaid portions of all shares, are to be applied in discharge of the liabilities. If the case stood upon that section alone it might be a very considerable question whether the meaning was not that the money was to be called up and applied among all the creditors, so that the shareholder should only receive his share of his debt; but that is, in my judgment, made quite clear by the 101st section. Although that section does not in terms say that there is to be no set off, yet it shows that the legislature, in framing that section, thought it had already been enacted that there should be no set off, because in the 101st section they proceed to say that where there is unlimited liability, then, in the case of any independent contract, there may be a set off. The reasonable distinction between a company with unlimited and limited liability is obvious. In the case of unlimited liability the reason of allowing the set off in respect of one particular call is, that it does not at all prejudice the rights of the other creditors, because all the shareholders are liable to the fullest amount of everything they possess, and therefore if that call does not pay the creditors all their debts in the case of an unlimited company, then another call may be made on the shareholders, including this particular shareholder, and so on, until the shareholders have been made to pay everything they can pay and the debts are satisfied. Therefore it appears to me to be plainly enacted that the assets are to be so dealt with, and it is quite clear that the company cannot, by making an agreement with a particular shareholder, save him from that liability which the act of parliament has imposed upon him.

Then as to the question whether this is *ultra vires*, I am disposed to think that the contract is not really *ultra vires*. It is only that the statute has put a certain construction upon it. Certain persons had agreed that there should be a set off, and then the act of parliament says that that set off shall not prevent the liability to pay up all the unpaid calls upon shares, but shall be binding as between the particular shareholder and the other shareholders after the creditors have been paid in full. The contract, as it appears to me, must be construed with reference to *the provisions of the act of parliament, and the

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effect therefore is, that without being *ultra vires* it cannot prevent those who plainly are contributories from being liable to be called upon in respect of the unpaid sums due from them.

Solicitors: Messrs. *Williamson, Hill, & Co.*; Messrs. *Wanscy & Rowen*.

[Law Reports, 8 Chancery Appeals, 266.]

L.C. & L. JJ. Dec. 18, 1872.

In re CONTRACT CORPORATION. GOOCH'S CASE.*

Contributory — Past Member — Infant Transferee — Adult.

A shareholder in a company transferred shares to an infant, who transferred them to another infant, who transferred them to an adult, and all the transfers were registered. The company was ordered to be wound up more than a year after the first transfer, but less than a year after the last transfer:

Held (reversing the decision of the master of the rolls), that after the company had once obtained an adult shareholder, the intermediate transfers could not be avoided, that the shareholder ceased to be such at the date of the first transfer, and that he could not be put on the list of past members.

On the 14th of January, 1865, Thomas Gooch, who held a large number of shares in the Contract Corporation, Limited, executed a deed purporting to transfer forty of them to one Adams, an infant, and the transfer was duly registered. On the 16th of August, 1865, Adams executed a deed purporting to transfer twenty of the shares to Dove, also an infant, and that transfer also was duly registered. On the 5th of December, 1865, Dove executed a deed purporting to transfer these twenty shares to Beal, a person *sui juris*, and that transfer also was duly registered. On the 20th of March, 1866, a petition for winding up the company was presented, upon which a winding up order was made on the 23d of April, 1866.

Beal was placed on the list of contributories in respect of these twenty shares, and a balance order was made against him. He afterwards became bankrupt. Gooch had died in December, 1865, and the official liquidator applied before the master of the rolls to have Gooch's name, and that of his executor, placed on the B list of contributories in respect of these twenty 267] shares. There was *evidence that the officers of the company were not aware that either Adams or Dove was an infant; and that the official liquidator did not make the discovery until after the balance order had been made.

The master of the rolls held that Gooch's liability did not

*Reversing 3 Eng. Rep., 818.

cease until the transfer to Beal was registered, and his lordship placed Gooch's name on the B list; as reported (1).

Gooch's executor appealed.

The *Solicitor General* (Sir G. Jessel), and Mr. *Bagshawe*, for the executor; This case is unlike the case of a mere transfer to an infant. Here the company had an adult shareholder, and accepted him. He has been placed on the list of contributories, and a balance order obtained against him. Beal could not have repudiated, and the company cannot be entitled to two contributories for the same shares. Gooch is either on the A list or on no list at all. If these deeds are all void he has been always on the register. Suppose that it had been Gooch's estate which was insolvent, then the company would have taken Beal. They cannot be allowed to play fast and loose in this way. *Lumsden's Case* (2) has been overruled. When once the company has an adult shareholder it is all over; *Parson's Case* (3). They might have inquired as to the new shareholder.

[They also cited *Mitchell's Case* (4) *Symons' Case* (5), and *In re Bahia and San Francisco Railway Company* (6).

Sir R. *Baggallay*, Q.C., and Mr. *Chitty*, for the official liquidator: It has never been held that a company is bound to retain a shareholder merely because they have treated him as such. It is the duty of the transferor to see that the transferee is a proper person: *Mann's Case* (7). The company did not until after the winding up know the facts. Gooch did not transfer to a person who was competent to hold, and the subsequent transfers go for nothing. We must have a shareholder on the list [268 for the period between Gooch's transfer to the infant and the transfer to Beal. Gooch remains a shareholder, for the purposes of sect. 38 of the Companies Act, until a competent person is put on the register. The creditors are entitled to his liability for a year, and Gooch must for that time have a transferee capable of taking his liability: *Curtis's Case* (8); *Castello's Case* (9).

The *Solicitor General* in reply.

LORD SELBORNE, L. C. : It appears to us that this appeal ought to succeed.

Whatever is material to determine the question in this case had happened before the winding up. Before the winding up the share list had on it, so far as relates to the shares in question, a shareholder of full age, in all respects competent, having in him the legal liability for these shares; and his title to those

(1) Law Rep., 14, Eq., 454.

(2) Ibid., 4 Ch., 31.

(3) Ibid., 8 Eq., 656.

(4) Law Rep., 9 Eq., 363.

(5) Ibid., 5 Ch., 298.

(6) Ibid., 3 Q. B., 584.

(7) Law Rep., 3 Ch., 459, n.

(8) Law Rep., 6 Ex., 455.

(9) Law Rep., 8 Eq., 504.

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shares the company is estopped from disputing. That title was derived from Dove, a previous shareholder, who was upon the register. After that transfer had been made, the company remained for some time before winding up, and, in my judgment, they had during that time no right whatever to go back beyond the transfer which had been made to Beal, or to raise any question at all as to the voidability or otherwise of any intermediate transfers between that made by Gooch and that made to Beal. From the time when they had a good shareholder upon their register, with respect to whom they were bound, and who was bound with respect to them, they ceased to have any interest in the voidable character of the intermediate transfers.

Then, the question which remains is solely upon the interpretation of the 38th section of the Companies Act, 1862. What has been decided by at all events a considerable preponderance of authority in this court, and in accordance with the general principles of law, is, that a transfer to an infant is voidable but not void. I will assume that it is voidable at the option of the company as well as at the option of the infant, subject to any difference which particular circumstances might make. That [269] being so, the *facts are these, as they probably would be in most of such cases: A transfer by deed having *de facto* taken place from Gooch to the infant Adams, that deed is accepted by the company; Adams is registered in their books in the place of Gooch; and at the proper time they return to the officer for the registration of joint stock companies the particulars required by the act of parliament, one of which is the time when any one, having been a shareholder upon the lists previously returned, ceased to be shareholder. They returned Gooch as having ceased to be a shareholder; and all person dealing with the company upon the faith of the returns made to the registrar of joint stock companies would from that time forth at all events cease to look to the liability of Gooch as a shareholder. It appears to be clear, and it was admitted in the course of the argument, that if the infant transferee, coming of age before any winding up, had elected to stand by the transaction and to hold the shares, it could not have then been said that Gooch ceased to be a member at the date of the ratification, as he would have ceased to be a member at the date of the transfer to the infant. Then why should not any other act which substantially puts an end to Gooch's title in a manner binding upon the company and not voidable, be deemed to have relation to the original transfer, which was voidable but which was never avoided, and which so far as the company is concerned, could not now be avoided?

It appears to me that a transfer having before the winding up

been made to an adult, who was to all intents and purposes a good shareholder, it was not possible before the winding up order, and it is not possible under the winding up order, for the company to go back and now to avoid, not the transfer by which the existing shareholder was constituted such, but transfers which are *functus officio*, which have been spent by intermediate transactions, and through which the title of the existing shareholder is derived.

I wish to say further, that, if I found in the 38th section words supporting the argument which has been offered, that there always must be some person against whom the liability for a year as a past shareholder can be enforced, of course I should think it necessary to give full effect to those words; but I do not find any such words. I find a clause which, in its affirmative part, says generally that all past members are to be liable to contribute; but that general enactment *is subject [270 to qualifications in their favor, the first being that no past member shall be liable to contribute to the assets if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up.

It appears to me that the respondents are in this dilemma, that if Gooch did not cease to be a member when he made the transfer, he could not cease to be a member by the act of an infant, who upon that supposition, derived no title from him; and if so it is difficult to see why he, or his executor in his name, should not be a member still. The act says that he is not to be liable to contribute if he ceased to be a member for more than a year; and in my judgment he must be regarded as having ceased to be a member for more than a year.

SIR W. M. JAMES L.J.: I entirely concur in the opinion of the lord chancellor.

SIR G. MELLISH, L.J.: I am of the same opinion.

Solicitors for the official liquidator: Messrs. *Linklater & Co.*

Solicitor for Mr. Gooch's executor: Mr. *H. W. Vallance.*

[Law Reports, 8 Chancery Appeals, 283.]

L.C. & L.JJ. Jan. 23, 1878.

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* *Ex parte* HALLIDAY. *In re* LIEBERT.

Bankruptcy — Fraudulent Preference.

L. being on the eve of bankruptcy, drew out all his balance at his bankers and sent it to K., who was employed by him as accountant, and to whom he owed a considerable sum. His object in sending the money to K. was to prevent its being

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attached by another creditor, who had issued a writ against him. K. took back the money, and refused to accept it unless the debtor consented to his paying himself out of it. After some discussion, the debtor agreed to this, and K. accordingly appropriated £421, part of the sum entrusted to him, in satisfaction of his own debt. The evidence did not establish that there had been anything which amounted to pressure for payment on the part of K. before the occasion on which he took back the money to L. Three days afterwards L. stopped payment, and soon afterwards presented his petition for liquidation:

Held, that the act of the debtor in drawing out the balance from the bankers for the purpose of defeating the creditor who was suing him was in itself an act of bankruptcy, and that the payment of the £421 to K. was a fraudulent preference.

THIS was an appeal from a decision of Mr. Registrar Spring Rice, sitting as chief judge.

The application to the registrar was made by the trustee under the liquidation of Messrs. Liebert & Rogerson, who were commission agents in London, for a declaration that a payment of £421 17s. 1d. made by J. Liebert, one of the insolvent firm, to Mr. J. W. Kealy, was void, as having been made with a view of giving him a fraudulent preference over the other creditors.

In the month of August, 1870, Kealy, who had been introduced to Liebert by a Mr. Sevin, was employed by the firm to make up their books and to act as their accountant, at a salary of £2 2s. a day of eight hours, and £1 1s. for each clerk employed by him.

On the 27th of September, the 31st of October, and the 23d 284] *of December, 1870, Kealy received three several sums of £50 on account of his charges. At the time of the insolvency he claimed a balance due to him of £440 12s. 5d.

Kealy stated in his affidavit that during those months he repeatedly pressed Liebert for money on account of his charges; and in his examination he said that on the 23d of December, when the last sum of £50 was paid, he told Liebert that he had a very heavy account against the firm, and asked him to pay it; and that Liebert said, "Very well, you may settle it; I will send you the money." But he could not remember that he named any particular sum as due. Mr. Sevin also stated that he had several times, in the months of November and December, applied to Liebert to settle Kealy's account. There was no evidence of any application for payment after the 23d of December, 1870; but on the 7th of January 1871, Liebert sent him bank notes and cash to the amount of £851 17s. 1d., accompanied by the following letter:

"Dear Sir—We beg to hand you herewith, as requested, £851 17s. 1d., being the balance of cash in hand this day, as per statement at foot, and remain, dear sir,

"Yours faithfully,

"LIEBERT & ROGERSON.

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	£	s.	d.
" Messrs. Barnett & Co., balance . . .	520	17	1
" Dennison	359	18	0
	<hr/>		
	£880	15	1
	<hr/>		
	£	s.	d.
By Mr. Gammon	15	0	0
" Trade expenses	10	0	0
" Barnett's check	4	18	0
	<hr/>		
	29	18	0
	<hr/>		
	£851	17	1"

The firm were indebted to the executors of Mr. J. Rogerson, the father of the present partner, E. Rogerson, in a sum of £20,000, which he had invested in the business; and negotiations were pending with the executors, who had called for payment, to allow that sum to remain in the business, it being admitted that unless this was done the firm could not continue to carry it on.

On the 3d of January, 1871, a check of the firm on Barnett * & Co., which had been paid into the Consolidated Bank [285 at Manchester, was presented for payment and was dishonored, and a writ was accordingly issued on the 7th of January against the firm by the Consolidated Bank.

Liebert admitted, in his examination, that he drew out the money which he sent to Kealy from Barnett & Co.'s and Dennison's banks, for fear that the creditors should attach the balances at the bankers.

Kealy was, however, unwilling to accept the money without more definite instructions as to its application; and, on the same day, as he stated in his affidavit, he took the money back to Liebert, and refused to accept the same unless the firm authorized him to pay himself and Mr. Dollman, the solicitor of the firm, what was due to them, and to cancel the letter; and he told Liebert that if he did not agree to his request, he should refuse to perform any more work for his firm. He pressed Liebert strongly to give him this authority, and, after considerable discussion, which lasted nearly two hours, he assented to Kealy's proposal, and gave him instructions to pay Mr. Dollman £100 for his charge, and also gave him authority to retain so much of the balance of the said sum of £851 17s. 1d. as would be sufficient to cover the amount of Kealy's charges.

Accordingly, on the same day Kealy wrote a letter to Messrs. Liebert & Rogerson as follows:

"Dear Sirs — I beg to acknowledge the receipt of £851 17s.

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1d. According to your instructions, I have made the following payments, viz. :

	£.	s.	d.
To Mr. Dollman, for his charges . . .	100	0	0
" myself, for my ditto . . .	421	17	1
	<hr/>		
	£521	17	1

which amount deducted from the above sum of £851 17s. 1d. will leave £330 to your credit. But inasmuch as there are other charges in contemplation, I shall hold the same as security for whatever expenses may be incurred from date of account.

"I remain, dear Sirs,

"Yours faithfully,

"J. W. KEALY."

286] *The firm stopped payment on the 10th of January, and on the 19th of January presented their petition for liquidation; but Kealy denied that he had any knowledge that such a step was in contemplation, and that Liebert had led him to believe that funds would be forthcoming to meet the demands on the firm.

Under these circumstances, the registrar was of opinion that the payment of the sum of £421 17s. 1d. was a valid payment to Kealy, and refused the application of the trustee, who now appealed from this decision.

Mr. Little, Q.C., and Mr. J. Edwards, for the appellant: There is no doubt, from the facts proved in evidence, that Liebert knew that his firm was on the verge of bankruptcy on the 7th of January. The only question is, whether this payment was made in consequence of pressure by the creditor. There is no evidence of any pressure by Kealy, or even of any application by him for any definite sum; on the contrary, Liebert admits that that money was originally handed over to him to hold for the firm, in order that it might not be attached in the hands of the bankers. This was in itself a fraud upon the creditors, and an act of bankruptcy.

Mr. De Gex, Q.C., and Mr. Brouh, for Kealy: A payment to a creditor on the eve of bankruptcy is not a fraudulent preference unless it is purely voluntary. The debtor may have other motives besides the fear of legal proceedings, but they will not invalidate the payment if the creditor really pressed for payment: *Edwards v. Glyn* ⁽¹⁾; *Brown v. Kempton* ⁽²⁾; *Bills v. Smith* ⁽³⁾; *Strachan v. Barton* ⁽⁴⁾. In the last-mentioned case the debt was not even due at the time of payment, and yet the payment

⁽¹⁾ 2 E. & E., 29.

⁽²⁾ 19 L. J. (C. P.), 169.

⁽³⁾ 34 L. J. (Q. B.), 86.

⁽⁴⁾ 11 Ex., 647.

was held not to be fraudulent. In the present case, both Kealy and Sevin pressed for payment, and although it may be true that there was no special application on the day when the payment was made, yet it was made in consequence of previous pressure, and that is sufficient: *Ex parte Tempest* ⁽¹⁾.

There was nothing fraudulent in the act of withdrawing the *balance from the bankers to prevent the creditors who [287 had commenced proceedings from sweeping it all away. The debts were merely changing the *situs* of the property, which they had a perfect right to do. It is not an act of bankruptcy to remove goods to avoid an execution. Liebert had no intention to defeat the general body of his creditors; on the contrary, the removal of the balance was really in their favor.

SIR G. MELLISH, L.J.: The question is, whether the payment of a sum of £421 17s. 1d. made by Liebert, one of the debtors, to Kealy on the 7th of January, 1871, was or was not a fraudulent preference and an act of bankruptcy. We must first consider in what circumstances the payment was made to him. There is strong and conclusive evidence that Liebert knew at the time when he made the payment that the bankruptcy of the firm was impending. The firm was, in fact, trading on a borrowed capital of £20,000. The lender had died, and his executors declined to continue the loan, and it was clear that if that sum was withdrawn they could not continue the business. A check drawn by the firm had just been dishonored at the bankers, and a writ for the sum for which the check was drawn had been issued, and was served on the firm on the 7th of January. Kealy had been employed as an accountant to make up the books of the firm for a specified remuneration. There had been three payments on account of his salary, the last having been made on the 23d of December, and he alleged that there was still due to him on the 7th of January above £421. The evidence of demand of payment was as follows: Mr. Sevin, who had introduced Kealy to the firm, says, that in November and December he had made several general requests on Kealy's behalf for payment. Kealy admits, in his examination, that he made no demand himself subsequently to the 23d of December, and it is not proved that he made any demand on that day; certainly he made no such demand for the payment of the whole of his debt. I cannot suppose that he could have meant to do so, otherwise he would have sent in his account, and would have said: "if you do not pay the account I will not go on keeping the books." But nothing of the kind was done, and the utmost that can be inferred is, that he asked

(1) Law Rep., 6 Ch., 70.

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288] *for a sum as an installment, as on former occasions. On the 7th of January, Liebert, as appears from his letter, drew out the whole of the balance of the firm at their London bankers, and paid it to Kealy. Was that a fraudulent preference or not? It is clear to my mind that it was an act of bankruptcy, whatever view is taken of the intention of Liebert in sending the money. If his intention was that it should be applied in paying the debt of Kealy, that would clearly be a fraudulent preference under the 92d section of the bankruptcy Act, 1869. As a matter of fact, I should infer not only that the payment was not made, wholly or in part, in consequence of the pressure of the former demand, but that the debtors did not intend to make any payment at all, so long as they were able to go on with their business, and that when they found it impossible to go they gave a preference to this particular creditor.

Another possible view of the case is, that Liebert did not intend the money to be applied by Kealy in the payment of any debts. Even in that view I think it would have been an act of bankruptcy, because it would have been done to defeat the creditors who were pressing for payment. It is not, however, necessary to decide that point, because I infer that, as a matter of fact, the money was sent for the purpose of preferring this particular creditor, and was on that account an act of bankruptcy. If so, what took place later on the same day could not alter the effect of the transaction. Kealy very naturally was not satisfied with receiving the money in the manner in which it had been sent, and he went to Liebert to have a more conclusive arrangement made. If no money had been sent before that interview sufficient pressure would have been shown; but as in my opinion the payment of the money in the morning constituted an act of bankruptcy, what happened afterwards on that day could not alter it. The order of the registrar must be discharged, and an order made for the repayment of the money to the trustee.

LORD SELBORNE, L.C., and SIR W. M. JAMES, L.J., concurred.

Solicitors for the trustee: Messrs. *Phelps & Sidgwick*, for Messrs. *Sale & Co.*, *Manchester*.

Solicitor for Kealy: Mr. *F. Dollman*.

(Law Reports, 8 Chancery Appeals, 289).

L.C. and L. JJ. Jan. 24, 31, 1878.

* *Ex parte* CHALMERS. *In re* EDWARDS.

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Bankruptcy — Sale of Goods by Monthly Installments — Insolvency of Purchaser — Right of Vendor to refuse further Delivery — Price of past Installments — Stoppage in transitu — Rescinding Contract.

H. sold 330 tons of bleaching powder to E., to be delivered thirty tons per month, payment to be made in cash fourteen days after each delivery. The whole amount was delivered except one installment of thirty tons due in December, 1871; but the November installment was not paid for. On the 20th of December, E. called a meeting of his creditors and declared himself insolvent. On the 23d of December H. wrote a letter refusing to deliver any more bleaching powder under the contract. In February following, E. was adjudicated bankrupt, and the trustee applied to the court for an order upon H. to pay £150 damages for non-delivery of the December installment of goods:

Held (affirming the decision of Bacon, C. J.), that although neither the non-payment of the November installment nor the bankruptcy of E. would entitle H. to rescind the contract, yet he had a right, after the declaration of insolvency, to refuse to deliver any more goods till the price of both the November and December installments had been tendered to him:

Held, also, that H.'s letter of the 23d of December did not excuse the trustee of E.'s estate from tendering the price of the two installments before claiming damages for the non-delivery of the December installment.

THIS was an appeal from a decision of the chief judge in bankruptcy.

On the 19th of October, 1870, Messrs. Hall Brothers & Shaw, of Widnes, contracted to sell to the bankrupt Edwards 330 tons of bleaching powder, upon terms which were stated in the following letter written by their agent:

“Dear Sir: I have this day sold to you, on account of Messrs. Hall Brothers & Shaw, Widnes, 330 tons of bleaching powder, 35 per cent., at 8s. 6d. per cwt., free on board here, to be delivered thirty tons per month from February to December, 1871, both inclusive. To be packed in oak casks, and to be unbranded. Payment by cash in fourteen days from date of each delivery, deducting 2½ discount.”

Under the terms of this contract the monthly installments up to and including the October installment were delivered and paid for. The November installment was delivered, but was not paid for.

*On the 20th of December, 1871, Edwards called a meeting of his creditors, at which he declared himself insolvent. Messrs. Hall & Co. attended this meeting, and on the 23d of December they wrote a letter to Edwards in the following terms:

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"We give you notice that we refuse to deliver any more bleaching powder upon contract."

Accordingly, the December installment of bleaching powder was never delivered.

On the 1st of January, 1872, Edwards filed a petition for liquidation by arrangement; but on the 19th of January it was resolved to proceed in bankruptcy, and he was adjudicated a bankrupt on the 8th of February following. Mr. Chalmers was subsequently appointed trustee.

Under these circumstances the trustee claimed the delivery of the thirty tons of bleaching powder, and on Hall & Co. refusing to deliver them, he claimed, in the county court at Liverpool, damages amounting to £150 against Hall & Co. for their breach of the contract. The county court judge having refused his application, the trustee applied to the chief judge in bankruptcy, who affirmed the decision of the county court judge. The trustee now renewed the application before the Court of Appeal.

Mr. C. Russell, Q.C., and Mr. Bigham, for the appellant: The contract between the parties has never been rescinded. If there had been no insolvency, the vendors could not have refused to deliver the December installment of bleaching powder on the ground that the price of the November installment had not been paid. They must have brought their action, and if Edwards had brought his action for non delivery of the December installment, the amounts recovered in the two actions would have been set off against each other. What passed at the meeting of the 20th of December did not have the effect of rescinding the contract. There was no absolute refusal to complete the contract as there was in *Withers v. Reynolds*.⁽¹⁾ On the contrary, Edwards was desirous of avoiding a bankruptcy, and going on with his business. There was here no right analogous 291] to the right of stoppage *in transitu*. There can be no lien on future deliveries of goods for payments due in respect of previous deliveries. But, admitting that there was a lien originally, we say that it was put an end to by the vendor's letter of the 23d of December. That was a direct breach of the contract. If it had not been for that letter it might have been incumbent on the trustee to tender the price of the December installment when he claimed the delivery of it; but that letter has rendered it unnecessary to do so.

Mr. Cohen, for the respondents, was not called on.

SIR G. MELLISH, L. J., after stating the facts of the case, con-

⁽¹⁾ 2 B. & Ad., 882.

tinued as follow: The first question that arises is what are the rights of a seller of goods when the purchaser becomes insolvent before the contract for sale has been completely performed? I am of opinion that the result of the authorities is this — that in such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered as well as the price of those still to be delivered. In *Bloxam v. Sanders* ⁽¹⁾ Bagley, J., says: “If goods are sold upon credit, nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in a case of insolvency the point seems to be perfectly clear: *Hanson v. Meyer* ⁽²⁾. If the seller has despatched the goods to the buyer and insolvency occurs, he has a right, in virtue *of his original ownership, to stop them *in transitu*. Why? Because the property is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has despatched the goods, and whilst they are in *in transitu*, *à fortiori* is it when he has never parted with the goods, and when no *transitus* has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if anything unwarrantable is done to that right.”

In *Wentworth v. Outhwaite* ⁽³⁾ Parke, B., says: “What the effect of stoppage *in transitu* is whether entirely to rescind the contract or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight of authority),

⁽¹⁾ 4 B. & C., 941, 948.⁽²⁾ 6 East, 614⁽³⁾ 10 M. & W., 436, 452.

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the vendor is entitled to retain the part actually stopped *in transitu* till he is paid the price of the whole, but has no right to retake that which has arrived at its journey's end. His right of lien on the part stopped is revested, but no more."

And in *Griffiths v. Perry* ⁽¹⁾, Crompton, J., says: "A vendor's lien on specific goods sold is gone when a bill is given for the price, but revives if that bill is dishonored before he has parted with possession of the goods; or rather, he then acquires, not a lien, strictly speaking, but a right of withholding delivery, analogous to the right of an unpaid vendor to stop *in transitu*. *Miles v. Gorton* ⁽²⁾, and many other cases, show that a part delivery of the goods does not do away with the right to withhold delivery of the rest, unless such part delivery is intended as a delivery of the whole. Then does it make any difference here that the goods were not specific goods? I think that *Valpy v. Oakely* ⁽³⁾ is conclusive to show that it does not; and I consider that case to have been rightly decided. . . . What, then, is 293] the position of the *parties upon the bill becoming dishonored and the vendee insolvent? According to Lord Abinger's view of the law in *Miles v. Gorton* ⁽¹⁾, the contract to deliver is thereby put an end to altogether. I am not inclined to go so far as to say that: but I think that, at all events, the vendor has a right, in such a state of things, to say to the vendee, 'I will not deliver the goods until I see that I shall get my price paid.' So, in the present case the plaintiff, or his assignees in bankruptcy, could not, I think, call upon the defendant to deliver the rest of the iron without paying him for it."

In both *Bloxam v. Sanders* ⁽²⁾ and *Wentworth v. Outhwaite* ⁽³⁾ there had been a sale of specific goods, not merely an agreement to sell goods to be delivered by installments; but it would be strange if the right of a vendor, who had agreed to deliver goods by installments were less than that of a vendor who had sold specific goods; and the judgment of Crompton, J., in *Griffiths v. Perry*, to which I have referred, shows clearly that there is no difference between the two cases.

I am, therefore, of opinion that, in the present case, when the insolvency of the purchaser had been declared the vendor was not bound to deliver any more goods until the price of the goods delivered in November, as well as those which were to be delivered in December, had been tendered to him. The only question then is, what was the effect of the vendor's letter of the 23d of December? Mr. Russell argued that the refusal to perform a contract before the time arrives for its performance

⁽¹⁾ 1 E. & E., 680, 688.

⁽²⁾ 16 Q.B., 149.

⁽²⁾ 2 Cr. & M., 504.

⁽³⁾ 4 B. & C., 941.

⁽¹⁾ 10 M. & W., 486.

is in itself a breach of the contract. But that can only be the case where the person who refuses to perform the contract is not entitled to refuse. Had the vendor in this case a right to refuse? In my view that depends upon the question whether the insolvent purchaser was ready and willing to pay the price both of the November and December installments. It is clear that he was not. I admit that the mere non-payment of the price of the November installment did not of itself give a right to the vendor to refuse to perform the contract; and I agree with what was said by Crompton, J., in *Griffiths v. Perry*, that the mere fact of the *insolvency of the purchaser did not [294] put an end to the contract. It certainly would be very unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if they could not have the benefit of those contracts. But if an insolvent has any such beneficial contracts, it is his duty to inform his creditors or the Court of Bankruptcy, if the case be within its jurisdiction, of the fact and he can then apply to have a sufficient part of his assets applied for the completion of the contracts, and if the contracts were beneficial this would, without doubt, be allowed by his creditors or by the court. If this were done, and due notice were given to the vendor, I entertain no doubt that he would be bound to complete the contract on his part, and would not be allowed to take advantage of the insolvency of the other party to put an end to the contract. But where the insolvent or his trustee does nothing of the kind, he practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts. In the present case, Edwards, by calling his creditors together and informing them of his insolvency, practically gave notice to Hall & Co. that he did not mean to pay them either for the November or the December installment. Indeed he could not pay for the November installment without the consent of the other creditors; it would have been a fraudulent preference. Both parties knew that he had no intention of paying any further sum; and Hall & Co.'s letter of the 23d of December only means that on the assumption, which assumption they were, under the circumstances, justified in making, that the November and December installments would not be paid, they refused to deliver any more bleaching powder. In my opinion they had a right to say that, and they committed no breach of the contract by writing the letter. The appeal must therefore be dismissed with costs.

LORD SELBORNE, L.C.: I entirely agree in the judgment of the lord justice, and in the reasons he has given for it.

295] *SIR W. M. JAMES, L.J.: I am of the same opinion.

Solicitor for the appellant: Mr. W. W. Wynne, agent for Messrs. T. & T. Martin, Liverpool.

Solicitors for the respondent: Messrs. Neal & Philpot, agents for Messrs. Jevons & Ryley, Liverpool.

[Law Reports, 8 Chancery Appeals, 309.]

L.JJ. Nov. 15, 16, 18; Dec. 14, 1872.

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*VYSE v. FOSTER.

[1870 V. 28.]

Executors and Trustees—Profits—Partners—Assets employed in Trade—Unauthorized Expenditure in improving the Estate—Just Allowances.

A testator was partner in a well established and prosperous business under articles by which, on the death of any partner, his share was to be taken by the surviving partners at a price to be ascertained from the last stocktaking, and to be paid by installments extending over two years, with interest at £5 per cent. per annum from his death. He appointed three executors, one of whom was one of his partners in the business, and another, some years after his death, became a partner; the third never was concerned in the business. The value of the testator's share was ascertained but not paid, the amount being allowed for some years to remain in the hands of the firm, who treated it in their books as a debt, and allowed interest on it at £5 per cent. per annum, with yearly rests. One of the testator's residuary legatees, upon becoming entitled to payment of her share, refused to accept payment on the above footing, and filed her bill against the executors claiming to be entitled to a share in the profits of the business arising from the use of the testator's capital. The money had been left in the hands of the firm with the knowledge of the testator's family, and all his residuary legatees, with the exception of the plaintiff, approved of what had been done:

Held (reversing the decision of Bacon, V. C.), that the plaintiff was not entitled to any account of profits, the mere delay by executors in calling in a debt due to the testator from a firm of which some of the executors are members not giving his estate any right to share in the profits of the business.

The testator devised his real estate upon the common trusts for sale, making his real and personal estate a mixed fund. His trustees and executors were advised that a few acres of freehold land which belonged to him might be advantageously sold in lots for building purposes, and that to develop their value it was desirable to build a villa upon part of them. They accordingly built one at a cost of £1600 out of the testator's personal estate. This villa had ever since been let at £80 a year, most of the other land had been sold, and the evidence tended to show that the outlay had benefitted the estate. Vice Chancellor Bacon having declared that the £1600 must be disallowed the trustees in passing their accounts:

Held, on appeal, that as the trustees had, in the *bond fide* exercise of their judgment, expended this sum as the best means of improving the estate, they could, at most, only be disallowed the amount of loss (if any) occasioned to the estate by the expenditure.

THIS was an appeal by the defendants, the executors of Richard Vyse, from a decree of Vice Chancellor Bacon.

The testator, Richard Vyse, was the senior and principal partner in a very old and well established business of merchants and straw hat manufacturers in London, Luton, New York, and Italy.

At the time of his death the partnership arrangements under certain articles of partnership dated the 17th day of September, 1853, were as follows :

The partnership consisted of Richard Vyse, Henry Vyse, John Reynolds, and Thomas Andrew Vyse. The capital was in round numbers £137,675, of which the testator had £90,284, Henry Vyse £39,977, and John Reynolds £7414; Thomas Andrew Vyse having no capital. The partners were to have 5 per cent. interest on their capital, and the surplus profits were to be divided as follows : Richard Vyse six-sixteenths, Henry Vyse five-sixteenths, John Reynolds three-sixteenths, Thomas Andrew Vyse, who had no capital two-sixteenths.

The testator had a power, which he did not exercise, of withdrawing a large portion of his capital without affecting the division of the profits between the partners. It was provided that in case of the death of any of the partners the surviving partners should take his share in the business at a sum to be ascertained as therein provided by means of the balance sheet made out at the last yearly stocktaking on the 30th of June, the sum so ascertained to be in full for the purchase of such share and to be paid by four installments at six, twelve, eighteen, and twenty-four months respectively after his death, with interest at £5 per cent. per annum from his death until payment, for which installments promissory notes were to be given by the surviving partners.

The testator died on the 13th of July, 1855, leaving all his partners surviving, and leaving a will by which he appointed the defendants Thomas Foster, his partner Henry Vyse and Edmund Waller Vyse, his executors and trustees, and devised to them his real estate upon trust to sell it and apply the proceeds as part of his personal estate ; and he bequeathed to them his personal estate upon trusts under which his nine surviving children ultimately became entitled to it in equal shares, the shares of daughters not becoming indefeasibly vested till they attained the age of twenty-five years. The plaintiff, who was the youngest daughter, was in the eleventh year of her age at her father's death.

*The testator left ten children surviving him, but one[311 of the ten died in 1858, and his share became divisible among the others by virtue of a gift over contained in the will.

The balance sheet of the firm of Vyse & Sons up to the 30th day of June, 1855, on the footing of which the share of the said testator Richard Vyse in the said partnership at his death was ascertained under the provisions of the said partnership articles. was as follows :

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Liabilities.			Assets.		
Richard Vyse . . .	£101,058	13 6	..		
Henry Vyse . . .	38,475	6 7	..		
Thomas A. Vyse, Jun. . .	5,821	10 9	..		
John Reynolds . . .	13,904	15 11	..		
William Barnes and others . .	950	0 0	..		
Allowance on book debts . .	870	1 0	..		
" " Bills . . .	308	3 0	..		
Debts owing . . .	33,880	17 1	..		
Allowance on Mr. Vyse's Account, Ludgate street . .	150	0 0	..		
	£195,419	7 10	£202,295	4 5	

The first four items being the amounts of capital standing to the credit of the partners respectively.

By the addition of interest and profits the sum of £101,058 13s. 6d. standing to the credit of the testator in the above balance sheet was made up to £107,601 2s. 6d., which amount was payable to his estate according to the provisions of the articles. Out of this the sum of £90,000 was some time after the testator's death apportioned among his nine surviving children according to the trusts of the said will, making the sum of £9000 for each child, the apportionment being treated as made upon the testator's death. Subsequently, in 1861, the further sum of £11,700, being further part of the debt due from the firm, was in like manner apportioned among the nine children, making the sum of £1300 for each child; and in 1867 the further sum of £9000, being further part of the debt, was in like manner apportioned among the nine children, making the sum of £1000 for each child. After these apportionments had been made, the 312] sum apportioned to each *child was carried to the credit of such child in the accounts kept by Henry Vyse. These apportioned sums were not, however, at once drawn out, but were, to a considerable extent, allowed to remain in the hands of the firm.

The sums from time to time in the hands of the firm for the time being in respect of the estate of Richard Vyse were treated by the executors and the partners for the time being as a debt due to the executors from the firm bearing interest at the rate of £5 per cent. per annum, with yearly rests, and such interest was credited to the estate of the said testator by the firm on the amount of the debt for the time being due from the firm to the estate of the testator, and the debt was treated as wholly distinct from the capital of the firm.

The whole of the sums apportioned to the plaintiff, as above mentioned, remained in the hands of the firm till the 9th of

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August, 1867, when the executors received the sum of £3173 5s. part of her share, and invested it in the purchase of £1428 11s. 6d. ten and a half per cent. Indian stock; and on the 29th of January, 1868, they invested £7956 17s. 6d., being a further part of her share, in the purchase of £8500 £3 per centum Consolidated Bank Annuities. After these investments the sum of £3104 19s. 11d. was due from the firm on the 13th of July, 1869, in respect of the plaintiff's share, the account being taken as follows: on each 13th of July interest at 5 per cent. was computed on the balance in the hands of the firm on the previous 13th of July, and carried to the plaintiff's credit. She was debited with all sums drawn out by the executors for her use, with interest at £5 per cent. per annum from the times of their being drawn out, and a balance was struck. The balance of this account was the sum on which interest at £5 per cent. was computed for the next year.

The executors, by their answer, made the following statement as to the position of the assets at and for some years after the death of the testator:

"The debts due to the said firm of Vyse & Sons at the death of the said testator could not have been collected for several years after his death, and, in fact, the debt of £120,340 7s. in the said balance sheet appearing to be due to the said firm from the business *carried on at New York was not and could [313 not be got in until nearly ten years after the testator's death; and although there was a large debt due as aforesaid from the said firm to the estate of the said Richard Vyse, such debt was not money available for the purposes of trade. We admit that large profits have been made since the death of the said testator by the said firms of Vyse & Sons and Vyse, Sons, & Co. Such profits have been attributable to the credit and connection of the said firms, and to the reputation, skill, and ability of the partners for the time being therein. Except as herein appears, no sums of money belonging to the testator's estate have been used by the defendants Henry Vyse and Edmund Waller Vyse, or either of them, in their or either of their said businesses; and, except as aforesaid, no profits have arisen from the employment of the sums of money in the plaintiff's bill alleged to have been used by the said defendants or either of them, in their or either of their said businesses. We believe that the said firms of Vyse & Sons and Vyse, Sons, & Co., from the death of the said testator, Richard Vyse, could, over the average of years, always have borrowed money at a less rate of interest than they were paying on the debt due from them to the estate of the said Richard Vyse, if they had desired to do so; but that they were willing to keep the said moneys in their hands for the benefit

of the family of the said Richard Vyse as long as they could do so without loss. We, however, say, that in August, 1867, the partners in the said firm of Vyse, Sons, & Co. had a discussion as to the amount of money which was in the hands of the said firm for which they had no profitable use, and in consequence of this discussion the said sums of £3178 5s. and £7956 17s. 6d. were withdrawn from the said firm at the times aforesaid, and invested by us for the plaintiff; and at or about the same time sums to a large amount were paid to, and invested for, others of the testator's children out of moneys withdrawn from the said firm."

It appeared that all the testator's children, except the plaintiff, acquiesced in, approved, and ratified all that had been done in respect of their shares, and were paid their shares accordingly. The members of the family were in the habit of treating the firm as their bankers, and leaving money in their hands upon which they could draw, interest at £5 per cent. being allowed as above.

314] *The partnership, which, upon the decease of the testator in 1855, consisted, as above stated, of Henry Vyse the executor, John Reynolds, and Thomas Andrew Vyse, continued on the same footing till 1859, when Edmund Waller Vyse, who was a son of the testator and one of his executors, was admitted a partner; and at the same time a new partner, named Thirkell, was taken in. The whole capital was at this time in round numbers £118,200, divided as follows. Henry Vyse, £57,200, John Reynolds, £32,000; Thomas Andrew Vyse, £13,300; Edmund Waller Vyse, £14,700; G. P. Thirkell, £1000. And the surplus profits above 5 per cent. on the capital were made divisible as follows: Henry Vyse, ten-thirtieths; John Reynolds, seven-thirtieths; Thomas Andrew Vyse, six-thirtieths; Edmund Waller Vyse, three and a half-thirtieths; Thirkell, three and a half-thirtieths.

This partnership continued until 1864, when a new partnership was formed. For the purposes of this new partnership the capital, property, and effects of the late co-partnership were valued at £188,550, which became the capital of the new firm, and was divided as follows: Henry Vyse, £97,750; G. P. Thirkell, £5850; Reynolds, £58,200; Edmund Waller Vyse, £21,750; Howard Vyse, £5000; F. Thirkell, nothing. And the surplus profits above 5 per cent. were made divisible as follows: Henry Vyse, five-twentieths; G. P. Thirkell, four-twentieths; Reynolds, three and a half-twentieths; Edmund Waller Vyse, two and a half-twentieths; Howard Vyse, two and a half-twentieths; Francis Thirkell, two and a half-twentieths.

By another arrangement made a few months later it was sti-

pulated that Thomas Andrew Vyse should be reinstated as partner, the partners participating with him in a certain New York business. The arrangement was a complicated one, but resulting in the following division of profits: Henry Vyse, four-twentieths; G. P. Thirkell, three and a half-twentieths; Thomas Andrew, three and a half-twentieths; John Reynolds, three-twentieths; the other three, two-twentieths each. This arrangement was determined in March, 1865, Thomas Andrew again retiring and taking his New York business with him.

In July, 1869, fresh arrangements were entered into by which John Reynolds retired, which need not be stated, as by that time the share of the plaintiff had been invested, except the [315 above mentioned balance amounting to a little more than £3000, which was ready to be paid to her, and was afterwards paid into court in this suit.

The plaintiff attained the age of twenty-five years in October, 1869. She declined to accept payment on the footing of the accounts above referred to, and in August, 1870, she filed her bill against the executors, alleging that a large portion of the testator's estate had been improperly retained in the business, and praying for an administration of the testator's estate, and for an account of all sums of money forming part of the estate which had been employed by H. Vyse and Edmund Waller Vyse in the business, and of all profits which had arisen from such employment, and that the defendants might be declared jointly and severally liable to account for such profits, and might be decreed to pay to the plaintiff at her option either so much of the profits as had accrued in respect of her share of the moneys so employed or compound interest at £5 per cent. on such share.

A minor point in the suit arose as follows: The testator was seized of a few acres of freehold land at Luton, where he resided. The trustees were advised that this might become valuable as building land, and that the best mode of developing it for that purpose would be to build a villa upon it. They accordingly built upon it a villa residence at the cost of £1600, which they paid out of the testator's personalty. It was admitted that the will, which only devised the realty on common trusts for sale, did not contain anything to authorize this expenditure. The villa had ever since been let at a rent of £80 per annum. The land was afterwards sold at prices averaging more than £700 per acre, with the exception of the villa and some plots containing in the whole about an acre, which remained on hand. The bill alleged this employment of the £1600 to be a breach of trust, and prayed that it might be de-

clared such, and that the defendants might be disallowed it in passing their accounts.

Vice Chancellor Bacon made a decree (1) declaring that the

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general account which had been taken immediately preceding his death; that such sum of money should be secured in the manner, and payable by the installments extending over two years, thereby provided; and therefore, that, at the most, it constituted a debt due from his partners. That the fact of one of his debtors being appointed one of his executors could not change the nature or character of the debt—that it was apparent, from the contract itself, that the testator's share in the partnership was to be the very means by which the business was to be continued, and that the ascertained amount of his share was to constitute a loan made by his direction to the surviving partners—and therefore that all that his representatives could claim was the payment of that debt in the manner contracted for. It was argued also that the only default which had been committed by the defendants, the executors, was that they had not exacted payment of the debt at the end of the two years, and that this default had been amply repaired by the allowance to the estate of compound interest at 5 per cent per annum from the testator's death.

Plausible as is this view of the case, and forcibly as it was argued, I am unable to adopt it. A long course of authorities has established a rule which, although it may lead to harsh consequences in partnership cases, is nevertheless one of such general policy that its enforcement has been decided to be a matter of necessity. It is true that if the only default of the executors had been the neglect to require payment of the debt due to the testator's estate, and if, in consequence, the debt had been lost, the liability of the executors would have been only to make good the loss with such interest as might have been made if it had been realized. But the present case extends much beyond that, for here, not only are no steps taken to call in the debt before, upon, or after the expiration of two years, but one of the executors continues to trade with the material capital in which the testator had a share. A few years afterwards another of the executors becomes a partner, and continues to carry on the same trade with

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the same material capital, and the third of the executors who, whether he did or did not know the particular circumstances connected with the partnership dealings, must be taken to have known his plain duty, is proved to have neglected that duty, and to have taken no step whatever to realize or secure the testator's estate. Unless, therefore, I could take upon me to depart from the rule I have adverted to, and to overrule the cases in which I find that rule unhesitatingly applied, I am compelled to hold that, for all the profits which have been made by the employment of the testator's estate in the trades carried on by the successive partnerships in which the defendants Henry Vyse and E. W. Vyse have been engaged since the testator's death, the executors are personally answerable. And if there were no such rule, I am compelled to add that I should find it impossible to discover any principle of equity or justice by which I could permit any of the defendants to retain those profits which have been made or have ensued in consequence of the neglect of their clear duty.

It was further suggested on behalf of the defendants that the relief sought by the plaintiff could not be afforded to her because the several persons other than the defendants who are or have been partners are not parties to this suit. No objection on this head is raised by the answer, and although I should not on that account have disregarded it, since it is taken at the bar, I am of opinion that it cannot be maintained consistently with the decision in *Brown v. De Tastet*. Reference was made on this subject to the case of *Simpson v. Chapman* (4 D. M. & G., 154), before the court of appeal; but I cannot think, regard being had as well to the circumstances of that case as to the true purport of the decision, that it affords any support to the objection. The real, I may say the only, subject of contention in that case was the supposed value of the good-will in a banking business in which the testator had been a partner, which had been carried on after his death, and into which his executor had been subsequently introduced as a partner. But it was clear that, so far from having any capital in

the concern at his death, the testator was largely indebted to the partnership. The court was of opinion that upon his death the surviving partners were under no obligation to discontinue the business, but were entitled to act thenceforth as bankers without or with any fresh partner; and although it is observed in the judgment that the question of good-will, if it had arisen, could not be conclusively adjudicated upon in the absence of the continuing partners, that observation was not necessary to the determination of the questions raised upon the appeal, since it was determined that no part of the testator's estate had been employed in the business which was carried on after his death. In another case also referred to, of *Macdonald v. Richardson* (1 Giff., 81), in which the vice chancellor, Sir John Stuart, overruled the objection that after-taken partners were not parties to a suit seeking an account of profits made by the testator's surviving partner in a business in which they had been jointly engaged, the vice chancellor seems to have thought that the decision in *Simpson v. Chapman* was somewhat at variance with other authorities. I think, however, that upon examination of what was there in fact decided, no such variance is to be found; and without relying upon my own recollection of that case, I should think it highly improbable that the then existing authorities were not referred to in the argument; but however this may have been, it is impossible to believe that the lords justices were not well acquainted with the general established law applicable to the case before them, or that they had forgotten, whether cited to them or not, the well known decisions of Lord Eldon, Sir William Grant, and Lord Cottenham.

With much better reason should the defendants' counsel refer to the facts alleged by the defendants as to their conduct and motives. It seems clear that the defendant Henry Vyse had kept regular and punctual accounts of the testator's estate, and of the shares of each of the children, and that he enjoyed and continues to enjoy the confidence of the testator's widow, and of his children, other than the plaintiff, all of whom had ample oppor-

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Plausible as is this view of the case, and forcibly as it was argued, I am unable to adopt it. A long course of authorities has established a rule which, although it may lead to harsh consequences in partnership cases, is nevertheless one of such general policy that its enforcement has been decided to be a matter of necessity. It is true that if the only default of the executors had been the neglect to require payment of the debt due to the testator's estate, and if, in consequence, the debt had been lost, the liability of the executors would have been only to make good the loss with such interest as might have been made if it had been realized. But the present case extends much beyond that, for here, not only are no steps taken to call in the debt before, upon, or after the expiration of two years, but one of the executors continues to trade with the material capital in which the testator had a share. A few years afterwards another of the executors becomes a partner, and continues to carry on the same trade with

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It was further suggested on behalf of the defendants that the relief sought by the plaintiff could not be afforded to her because the several persons other than the defendants who are or have been partners are not parties to this suit. No objection on this head is raised by the answer, and although I should not on that account have disregarded it, since it is taken at the bar, I am of opinion that it cannot be maintained consistently with the decision in *Brown v. De Tastet*. Reference was made on this subject to the case of *Simpson v. Chapman* (4 D. M. & G., 154), before the court of appeal; but I cannot think, regard being had as well to the circumstances of that case as to the true purport of the decision, that it affords any support to the objection. The real, I may say the only, subject of contention in that case was the supposed value of the good-will in a banking business in which the testator had been a partner, which had been carried on after his death, and into which his executor had been subsequently introduced as a partner. But it was clear that, so far from having any capital in

the concern at his death, the testator was largely indebted to the partnership. The court was of opinion that upon his death the surviving partners were under no obligation to discontinue the business, but were entitled to act thenceforth as bankers without or with any fresh partner; and although it is observed in the judgment that the question of good-will, if it had arisen, could not be conclusively adjudicated upon in the absence of the continuing partners, that observation was not necessary to the determination of the questions raised upon the appeal, since it was determined that no part of the testator's estate had been employed in the business which was carried on after his death. In another case also referred to, of *Macdonald v. Richardson* (1 Giff., 81), in which the vice chancellor, Sir John Stuart, overruled the objection that after-taken partners were not parties to a suit seeking an account of profits made by the testator's surviving partner in a business in which they had been jointly engaged, the vice chancellor seems to have thought that the decision in *Simpson v. Chapman* was somewhat at variance with other authorities. I think, however, that upon examination of what was there in fact decided, no such variance is to be found; and without relying upon my own recollection of that case, I should think it highly improbable that the then existing authorities were not referred to in the argument; but however this may have been, it is impossible to believe that the lords justices were not well acquainted with the general established law applicable to the case before them, or that they had forgotten, whether cited to them or not, the well known decisions of Lord Eldon, Sir William Grant, and Lord Cottenham.

With much better reason should the defendants' counsel refer to the facts alleged by the defendants as to their conduct and motives. It seems clear that the defendant Henry Vyse had kept regular and punctual accounts of the testator's estate, and of the shares of each of the children, and that he enjoyed and continues to enjoy the confidence of the testator's widow, and of his children, other than the plaintiff, all of whom had ample oppor

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317] counts, and *directing an inquiry what part of the testator's estate had been from time to time since his death and was 318] now employed by the *defendants H. Vyse and E. W. Vyse in the business, and what profits had been derived by 319] means of such employment; and *declaring that the defendants were to be charged with such profits and interest thereon at £5 per cent. per annum from the times when they were respectively made; and directing an inquiry as to the amount of the plaintiff's share in the residuary estate, having regard to the declarations.

The defendants appealed from the declaration as to the £1600, the inquiry as to employment of the testator's personal estate in the trade and the profits made by it, and the declaration as to their liability for profits.

The *Solicitor General* (Sir G. Jessel), and Mr *Amphlett*, Q.C. (Mr. *Rowcliffe* with them), for the appellants: This decree makes those executors, who were partners, personally liable for the profits made by other persons as well as themselves — makes

tunities of becoming acquainted with all the particulars relating to the estate; that he had allotted to the separate account of each of them £11,800 at three several times, in 1855, in 1861, and in 1867; that he had invested for the plaintiff the sums and retained the balance before mentioned; that he had duly accounted for interest and compound interest upon these sums; and that all the testator's children (with the exception of the plaintiff) were and are satisfied with these several dealings with the estate. If these reasons could prevail, the defendants would stand acquitted of the demands which the plaintiff now makes against them; but it is obvious that her rights cannot be affected by any arrangement which her brothers and sisters may think fit to adopt, nor by the manner in which or the circumstances under which the defendants may have acted.

I have no reason to doubt that by the manner in which the estate of the testator had been dealt with the plaintiff's fortune, as it is now stated by the defendants to exist, including the compound interest, amounts to several thousand of pounds more than she would have been possessed of if the defendants had realized the whole of the estate and had invested it in public funds, which is all they were bound to do or which she could have required. Nevertheless, I cannot for that reason

reject the claim she makes to have her share of the profits which have been made by the employment of the testator's estate in the business which has been carried on since his death, because the law which I am bound to administer has declared that such are her rights.

I must, therefore, declare that she is entitled to a decree for the general administration of the testator's real and personal estate, with the usual accounts and inquiries, accompanied by a declaration that an outlay of £1600 in building a villa on part of the estate, which I have not found it necessary to mention more particularly, was unauthorized, and ought not, as against the plaintiff, to be charged against the estate. There must be an inquiry as to what part of the testator's estate has been from time to time since his death, and is now, employed by the defendants Henry Vyse and E. W. Vyse in the several businesses carried on by them as in the pleadings mentioned, and what gains and profits have been derived by means of such employment, with a declaration that the defendants are to be charged with such profits and interest thereon at 5 per cent per annum from the respective times when such profits were made; and an inquiry as to the amount of the plaintiff's share in the testator's residuary estate, having regard to such declarations, reserving the further consideration of the cause.

an executor who was a partner during part of the time liable for profits all along, and the executor who was not a partner and got no profits, liable for profits. Such a decree cannot be supported. The surviving partners were entitled and bound to buy the testator's share at a price to be ascertained in a certain way, and it was so ascertained. The value then became a debt. If the executors had been strangers, it would have been a pure case of a *large simple contract debt due to them [320 from the firm; and the fact that one of the executors was a partner does not make it any the less a debt in equity. The case where the executors and the partners are the same set of persons is different. There the executors have got the money, and they are trading with it. Here the executors never did get the money; it remained due from the firm to them. At all events, the most that can be done is to make those of the executors who received profits refund the profits which they respectively received. Then the direction to charge interest on profits is an unheard of thing. The profits do not belong to the *cestui que trust* till he elects to take them; so there cannot be a charge of interest. Profits are also given by this decree during the period for which the moneys were by the articles to remain in the business. It is true that promissory notes were not given as provided by the articles; but to give them would have been an idle form, as the fact of one of the makers being one of the payees would have made them useless at law. We say, then, that the plaintiff has no claim to profits, and that interest at £5 per cent. with annual rests was the outside of what she could claim. Again, supposing she was entitled to profits, we say the result is the same. The only profits she could claim would be profits arising from the use of her money. Now, the profits of a business arise from capital, good will, and the skill and exertions of the partners, and it is very hard to say how much of them is attributable to any sum of money brought in. Here the partners by their articles settle that £5 per cent. per annum is due to capital; for each partner has that amount allowed on his capital, and the rest of the profits is divided in shares bearing no relation to the capitals of the partners: *Wedderburn v. Wedderburn* (1). The principle of giving profits is, that there is a breach of trust to which the partners are parties: *Simpson v. Chapman* (2); and this cannot be worked out in a suit to which the other partners are not parties. None of the authorities go anything near the length of this decree: *Docker v. Somes* (3); *Lindley on Partnership* (4); *Palmer v. Mitch-*

(1) 22 Beav., 84.

(2) 4 D. M. & G., 154.

(3) 2 My. & K., 655.

(4) Page, 883

321] *ell* ⁽¹⁾; *Brown v. De Tastet* ⁽²⁾; *Cook v. *Collinridge* ⁽³⁾; *Heathcote v. Hulme* ⁽⁴⁾; *Wedderburn v. Wedderburn* ⁽⁵⁾; *Simpson v. Chapman* ⁽⁶⁾; *Townend v. Townend* ⁽⁷⁾; *Macdonald v. Richardson* ⁽⁸⁾. It is shown by *Stroud v. Gwyer* ⁽⁹⁾ that a trader improperly borrowing money from trustees does not account for profits like a trustee, and in *Chambers v. Howell* ⁽¹⁰⁾ a similar principle is laid down. In *Willett v. Blamford* ⁽¹¹⁾, which is relied on against us for giving both interest and profits, there is not a word on the subject in the judgment, and the inquiries were without prejudice. *Crawshaw v. Collins* ⁽¹²⁾, supports our contention, and so does *Jones v. Foxall* ⁽¹³⁾.

Then, as to the villa, we say that the land on which the villa stands will now sell for £1600 more with the villa than without it and that the other land has sold better for its having been built. If a trustee without authority spends money in attempting an improvement of the estate, and it is not benefitted, he must bear the loss; but if the estate is made more valuable, it is against all justice that the *cestui qui trust* should take the benefit, and allow the trustee nothing.

Mr. Kay, Q.C., and Mr. Lindley, Q.C. (Mr. Romer with them), for the respondent: We say that the executors must make good the fund with all its accretions, whether they have received them or not.

[The LORD JUSTICE JAMES: This does not seem to me a case of accretion, but of mere personal demand.]

The executors ought not to let the money remain in the hands of a firm without bargaining to have the profits.

[The LORD JUSTICE JAMES: Do you say that would be so if no executor was a member of the firm?] No.

322] * [The LORD JUSTICE JAMES: On your principle I do not see why not.]

Stroud v. Gwyer ⁽⁹⁾ establishes that distinction. When no executor is in the business, it is a mere case of improper investment, not of trading with the assets. The appellants first contend that £5 per cent. was the amount of profits attributable to capital. The articles gave a preference to the capital to that extent, but there is no reason for saying that £5 per cent. was the whole amount of the profit attributable to capital. In every case where the *cestui que trust* is entitled to compound interest

(1) 2 My. & K., 673, n.

(2) Jac., 284.

(3) Jac., 607.

(4) 1 Jac. & W., 122.

(5) 22 Beav., 84; 4 My. & Cr., 41

(6) 4 D. M. & G., 154.

(7) 1 Giff., 201.

(8) Ibid., 81.

(9) 28 Beav., 180.

(10) 11 Ibid., 6.

(11) 1 Hare, 253.

(12) 15 Ves., 218; 1 Jac. & W., 267;

2 Russ., 325.

(13) 15 Beav., 388

at £5 per cent., he has an option to take the profits: *Jones v. Foxall* ⁽¹⁾; *Brown v. De Tastet* ⁽²⁾.

[The LORD JUSTICE JAMES: In that case no account had been taken, and the deceased partner's share had not been ascertained. The partnership, in fact, went on.]

The decree in that case goes the whole length of this, and it made one partner liable for the profits made by his co-partners: *Heathcote v. Hulme* ⁽³⁾ lays down the same principle. If an executor embarks money in trade, and profits are made by it, he cannot excuse himself by saying that he has allowed other persons to receive part of them: *Bowes v. City of Toronto* ⁽⁴⁾ supports our contention.

[The Solicitor-General: The money there had actually come to the hands of the person who was charged with it. *Crawshaw v. Collins* ⁽⁵⁾ shows that the *cestui que trust* has an option, and *Wedderburn v. Wedderburn* ⁽⁶⁾ shows the nature of the option. *Jones v. Foxall* agrees with this.]

[The LORD JUSTICE JAMES: According to all the authorities you have so far referred to, the *cestui que trust* may sanction the investment or repudiate it; but if he sanctions it he must take it as he finds it, subject to all the terms on which the executor made it.]

In *Macdonald v. Richardson* ⁽⁷⁾ an executor was made liable *for profits which he had not received. If I am limited to [323 the shares of the executors who were partners, at all events I am entitled to an account to show what they amounted to: *Dockcr v. Somcs* ⁽⁸⁾. Then, as to interest on profits, *Crawshaw v. Collins* ⁽⁹⁾ and *Willett v. Blanford* ⁽¹⁰⁾ are in our favor. The liability of persons who knowingly receive trust-money is joint and several: *Ex parte Heaton* ⁽¹¹⁾; *Ex parte Barnewell* ⁽¹²⁾; *Flockton v. Bunning* ⁽¹³⁾.

⁽¹⁾ 15 Ibid., 388.

⁽²⁾ Jac., 284.

⁽³⁾ 1 Jac. & W., 122.

⁽⁴⁾ 11 Moo. P. C., 463.

⁽⁵⁾ 15 Ves., 218.

⁽⁶⁾ 4 My. & Cr., 41, 44.

⁽⁷⁾ 1 Gift., 81.

⁽⁸⁾ 2 My. and K., 655.

⁽⁹⁾ 15 Ves., 230, n.

⁽¹⁰⁾ 1 Hare, 253.

⁽¹¹⁾ Buck, 386.

⁽¹²⁾ 6 D. M. & G., 795, 801.

⁽¹³⁾ FLOCKTON v. BUNNING. [1864 F., 89.] W. Flockton died in 1858, having by will given his real and his residuary personal estate to his wife and Lloyd upon the common trusts for conversion and investment, and to hold the fund upon trust to pay half the

income to his wife for her life, and as to the whole fund (subject to the above life interest in a moiety) upon trust for such of his children as should attain twenty-one, equally. He appointed his wife and Lloyd executors. Mrs. Flockton alone proved the will. Lloyd renounced and disclaimed. The testator left thirteen children, of whom the plaintiffs were six.

The testator had for some years before his decease carried on business as a turpentine and tar distiller in partnership with his brother, who died in 1850. At the testator's death the business was in course of being wound up and the assets sold and realized. It was finally wound up a few months after the death of the testator, and his

324] *Then we say that no allowance ought to be made for the expenditure in building the villa, which was a mere unauthorized

share of the proceeds was received by Mrs. Flockton.

The testator and his family had been long engaged in the trade, and Mrs. Flockton believed that it would be for the good of herself and children to carry it on, and take advantage of the connection formed by her husband and his brother. She accordingly entered into an arrangement for a partnership with a Mr. Hughes and the defendant Bunning. Articles of partnership dated the first of January, 1854, were entered into, by which Mr. Hughes, who was already carrying on the business on a considerable scale, admitted Mrs. Flockton into partnership. The capital of Hughes being £23,000, Mrs. Flockton was to bring in £4000, and to receive a share of profits proportional to her share of the capital, and Bunning, who brought in no capital was to receive one-third of the profits. Mrs. Flockton was not to attend to the business; Hughes was to attend to it as much as he pleased, and Bunning was to be the working partner. Mrs. Flockton brought into this business £3400 of the testator's assets.

On the 31st of December, 1856, this partnership was dissolved by consent, Hughes retiring from the business, and a new partnership was formed between Mrs. Flockton, Bunning, and James Roy. Roy died in 1861, and Mrs. Flockton and Bunning continued the business in partnership, having purchased the share of Roy from his executrix, Hannah Roy. The arrangements were completed in February, 1862, and Hughes having been advised that he was liable to the testator's residuary legatees for the £3400 which Mrs. Flockton had brought in out of the assets, it was agreed that she should invest in consols a sum of £606, and also £500 a year as an indemnity fund in the joint names of herself, Hughes, and Bunning; and a deed dated the 28th of February, 1862, declaring trusts of the fund, was executed, to which some of the testator's children, Mrs. Flockton, Bunning, Hannah Roy, and Hughes, were parties.

In July, 1862, Grindley became a partner, bringing in £5000 and paying £1000 a piece to Mrs. Flockton and Bunning. The articles of partnership

entered into on this occasion contained a clause providing that if Mrs. Flockton's share of the profits should at any time not be sufficient to make the investments required by the deed of the 28th of February, 1862, the deficiency should be made up out of her share of the capital.

In August, 1864, Bunning and Grindley, under a power in the articles, determined the partnership as regarded Mrs. Flockton, for breach by her of the stipulations contained in them, and gave her notice of their intention to take to her share upon the terms of the articles. This enabled them to take her share upon paying for it a price ascertained by a valuation in manner mentioned in the articles.

Mrs. Flockton, not long afterwards, became bankrupt.

The bill was filed by six infant children of the testator against Bunning, Grindley, Mrs. Flockton, several of the testator's adult children, an incumbrancer to whom Mrs. Flockton had made a mortgage of her share in the partnership, some other incumbrancers of hers, and her assignee in bankruptcy; and prayed for the execution of the trusts of the testator's will; for an account of the dealings of the partners with the partnership assets since the last account; for inquiries as to the shares of the partners in the capital of the business; that the share of Mrs. Flockton might be ascertained, and how far it represented the testator's assets; and that her share in the partnership, so far as it had accrued from or represented the assets and trust estate of the testator, might be declared assets subject to the trusts of his will.

Mr. Bacon, Q.C., and Mr. Herbert Smith, for the plaintiffs

Mr. Kenyon, Q.C., and Mr. Gill, for Mrs. Flockton.

Mr. C. T. Simpson, for Bunning and Grindley.

Mr. Karlake, Q.C., and Mr. Scrans-ton, for Mrs. Flockton's assignee.

Mr. Dickinson, Q.C., Mr. Langworthy, Mr. Bagshawe, and Mr. H. F. Shebbear, for incumbrancers.

SIR JOHN STUART, V.C., made a decree directing accounts of the testator's estate, and declaring that Mrs. Flockton, Bunning, and Grindley, were

*speculation. A trustee is not at liberty to improve the [325
cestui que trust out of the property.

bound to restore and make good to the plaintiffs such part of the assets of the testator belonging to the plaintiffs as had been employed by the defendants in trade, together with all profits made by such employment, or with interest at the rate of £5 per centum per annum upon what had been so employed; directing an inquiry what parts of the testator's assets had been employed in the successive partnerships, and what profits had been made by such employment; an inquiry whether it was for the benefit of the plaintiffs to elect to take interest at £5 per cent per annum upon such parts belonging to the plaintiffs of the testator's estate as had been employed in trade as aforesaid, or to take the profits which had been made by such employment, with a declaration that Mrs. Flockton, as executrix, was entitled to a lien upon the partnership property for what might be found to be the amount of the testator's assets employed in the trade and the profits derived therefrom.

Separate appeals were presented by Mrs. Flockton's assignee, and by Bunning and Grindley.

1868. June 26. SIR W. PAGE WOOD, L.J.: This case having been thoroughly sifted in the court below, where it took a long time in argument, is brought here in a much more simple form, and, as presented to us on appeal, becomes a very plain case. The first appeal was that of the assignee of the executrix, of which we have already disposed. We have now to deal with the appeal of Bunning and Grindley, who contend that they ought not to be made liable in any way for the amount of the testator's assets, which have confessedly to some extent been embarked in the trade in which they are engaged as partners. At first it was suggested that Grindley, at all events, came into the business in 1862 without any knowledge of the arrangements as to the testator's assets, and ought not to be held to have concurred in any breach of trust; but when the partnership deed was brought before our attention, Grindley's knowledge of the transaction was made perfectly clear, for it contains a precise statement that this lady wishes to indemnify her partners against the consequences of the money which was embarked, or was in-

tended to be embarked, in the present partnership having been withdrawn from the testator's assets for the purpose of being so embarked.

Then the simple case we have before us is this: two persons engaged in trade being desirous of having a partner with capital which can be supplied from trust funds, say to that person: "Join us and embark the trust funds which are put under your care in our business; make those trust funds part of our capital, and then we will join you, otherwise we will not; and that being so, we must have an indemnity from you, because we know what we are doing; we know that we are liable, and must be liable, for the trust fund which we have taken and made use of jointly with you as part of our capital; and therefore, as between you and us, you must indemnify us." If, therefore, there ever can be a clear case fixing persons with the legal consequences of dealing with trust funds, this is that case. The case of embarking assets in a new trade is a much worse case than that of continuing the assets of a deceased partner in a trade, for there is generally great inconvenience in suddenly withdrawing them from the business, and the retaining them too long may be morally justifiable, or, at all events, excusable. But I see no justification or excuse for taking what you know to be trust property and putting it into your business as part of your capital. What, then, are the consequences following from that act? The consequences, I apprehend, must be these. The partners make themselves co-owners of the fund, and use it as co-partners. In such a state of things they are just in the same position as an original trustee. Of the cases cited, *Travis v. Milne* (9 Hare, 141) was more to the purpose than any other. The vice-chancellor there makes a distinction between a fund advanced by way of loan and a fund mixed up with the consequences and liabilities of trade. In the one case the firm are borrowing money, their liability as to which may be probably more restricted than their liability as to trust money which they appropriate as part of their capital: but in the case before us there was a clear appropriation of the trust fund by all the three partners. I cannot,

326] *The LORD JUSTICE JAMES: My understanding of the law is, that where a trustee has spent money on the trust property

therefore, feel any difficulty in saying that the case is one to which *Travis v. Milne* is applicable, and that it is brought to the ordinary case of trustees employing a trust fund, and being answerable for the use they make of it. The decree, therefore, is substantially right, though it requires to be varied as to some matters of form, which will not affect the costs of the appeals.

SIR C. J. SELWYN, L. J.: So far as the appeal of the defendants Bunning and Grindley is concerned, there are two material facts necessary to be established, and besides them there appears to be no substantial question at all. The first of those facts is that some portion of the estate was employed in trade in breach of the trusts of the will; and the second fact is that the breach of trust was known to the partners at the time the partnership of these three was entered into. Now, having regard to the deed which has been entered into, the recitals in the deed, the operative part of the deed, the evidence given on behalf of this lady herself and her assignees, and on the part of the other party, it seems impossible to doubt that some portion of the estate was so employed, and that most distinct notice of that employment, and of its being a breach of trust, was brought home to those parties.

There remains the question whether, when so fixed with notice of the breach of trust, they are liable or not. Upon that I called the attention of Mr. Greene and Mr. Lindley to the very clear distinction which is drawn in Mr. Lindley's valuable book between the case where partners improperly allow a sum of money to continue in breach of trust in the business, and the case where the executors distinctly lend part of the money employed in the business to the surviving partners. Neither of those learned counsel—both of whom would have done it if it were possible to do it—could show that that distinction so drawn by Mr. Lindley in his book is not a very clear and sound distinction; and if so, the question is, to which of those two classes does this case belong? It is quite clear that it is a case of allowing the property to remain in breach of trust in the business, and not the case of a mere loan.

Feeling that, Mr. Lindley very ingeniously suggested another distinction; he said that all the cases of which *Travis v. Milne* is an example are cases of surviving partners, and that there is a distinction between the case of surviving partners and a case like the present, where two gentlemen came in who are not parties to the original breach of trust. That distinction appears to me to be nothing more than a distinction between retaining property in breach of trust and acquiring property in breach of trust, with notice of the breach of trust at the time of its being so acquired. If there could be a distinction, one would think it was rather worse to acquire the property in breach of trust than merely to retain it, because in retaining it the person might have said: "I was acting under some necessary obligation. It was not possible to do otherwise than I did." But when a person acquires the property, and acquires it with notice of the breach of trust, it is impossible to say he is not liable.

There remains only the question we have heard argued so often, as to the limited liability of the plaintiffs and their share of the interest in the estate. That seems to be contrary to the whole principle upon which this court acts in making decrees for the administration of an estate. The court does not allow the estate of a testator to be torn into pieces by a multiplicity of decrees, but it makes one decree, and provides for the rights of all the persons who, when the accounts shall have been taken, shall be found to have an interest in the estate of the testator. It would not allow one of these children to obtain one decree, and the other twelve children to obtain twelve more decrees, but it proceeds in one suit for the administration of the whole estate. I am of opinion that the defendants Grindley and Cooper are liable to the estate, and that they are so liable in *solido*.

The declaration, as varied, was as follows: "Declare that defendants, Mrs. Flockton, Bunning, and Grindley, are bound to make good to the testator's estate such parts of the assets of the testator as have been employed by the said defendants in trade, together with

in an *unauthorized way, the rule is to give him, at his own [327 expense, an inquiry whether the trust estate has been to any and what extent benefitted. He cannot on that footing obtain more than what is just.

[*Stepney v. Biddulph* ⁽¹⁾ was referred to.]

The *Solicitor-General*, in reply: This is not a case of trading with assets, but a case of loan. The money was properly in the business, and the only departure *from the strict line of [328 the executor's duty was delaying to call it in. It is impossible to attribute profits at all to this loan. The firm could have borrowed the money from strangers at a lower rate. It cannot be looked upon as part of the capital; it was dealt with in the books of the firm as borrowed money.

Dec. 14. SIR W. M. JAMES, L.J., after stating the facts of the case, continued: On the main question, whether, under these circumstances, the plaintiff is entitled to participate in the profits made by these successive firms, a very long list of cases was cited, and each elaborately commented on. It is not, in our opinion, necessary to refer to the class of authorities (of which *Crawshay v. Collins* ⁽²⁾ and *Brown v. De Tustel* ⁽³⁾ are leading cases), as to the consequences of continuing a partnership business after the death or bankruptcy of a partner where the business in which the estate of the dead or bankrupt partner was embarked has not been wound up or effectually and properly wound up.

This case is really not a case of partnership at all. By the partnership deed the testator had effectually sold all his share in the partnership property, and immediately on and after his death the only relation between his executors and the surviving partners was that of creditor and debtor, in no respect differing from the relation which would have subsisted if he had sold the business or any other property in his lifetime to perfect strangers, and had then died before the purchase-money was payable.

The case, therefore, resolves itself into a case of executors or trustees committing (at least technically) a breach of trust by allowing trust money due and payable to remain outstanding on the personal security of persons engaged in trade, one of the executors at first, and afterwards two of them, being engaged

all profits made by such employment, or for interest at the rate of £5 per cent per annum upon what has been so employed." The second inquiry was altered into an inquiry whether it was for the benefit of the persons interested in the testator's estate to elect to take interest or profits on so much of the

testator's estate as had been employed in the trade.

Solicitors: Messrs. *Richards & Walker*; Messrs. *Linklaters, Hunkinwood, & Addison*; Messrs. *Drake & Son*; Messrs. *Abbott, Jenkins, & Abbott*; Messrs. *Slee, Middleton, & Evans*.

⁽¹⁾ 18 W. R., 576.

⁽²⁾ 15 Ves., 218.

⁽³⁾ Jac., 284

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in such trade as partners, and having the use of the money so left in their hands.

On this subject there have been several cases which have been collected and stated with great care and clearness in Sir Edward Vaughan William's book on Executors. The actual results in 329] *these cases differ, but they all afford examples and illustrations of these general principles. If an executor commits a breach of trust, he and all those who are accomplices with him in that breach of trust are all and each of them bound to make good the trust funds and interest. If an executor or trustee makes profit by an improper dealing with the assets or the trust fund, that profit he must give up to the trust. If that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the *cestui que trust*, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent. In this case the successive partnerships have charged themselves in their own accounts with interest at 5 per cent, and with annual rests, and the sum due on that footing has been paid. And the questions, therefore, are, whether the plaintiff is entitled to anything, and if anything, to what and from whom, in respect of the surplus profits due to capital, and how are such surplus profits to be ascertained?

In the first place, it cannot be, and is not, denied that there was a clear breach of trust in not calling in and investing the money. It is as little to be doubted that the not calling in the money was at least at the outset an immense boon to the trading firm. In the state of the partnership assets as stated by the defendants themselves, the withdrawal of so large a sum as £100,000 in two years must have greatly embarrassed or crippled the business, probably been its ruin. It must at the same time be borne in mind that the testator must have well known the state of the partnership assets at the time of his death. By appointing one of his debtors one of his executors he rendered it impossible strictly and literally to carry out the terms of the bargain. There could have been no such thing as a valid promissory note by the executor and his partners to himself and his co-executors, and the debt was extinguished at law. It is reasonable to assume that the testator, in so appointing the debtor executor, and joining with him in the executorship his own son, one of the residuary legatees, intended that they should not break up the business by a peremptory demand of the debt the moment it became 330] due, and he could *not, at all events, have intended to deprive them of the power of doing what any reasonable creditor

would do under such circumstances, give the debtors a reasonable time and reasonable indulgence while getting in the assets, the position of which was as much his act as theirs, or to have imposed on them the duty of doing the only thing which it was open to them to do, of immediately filing a bill or bills in Chancery, which would have led to the immediate destruction of the business, a very valuable ancestral family property.

It is further to be borne in mind that the firm appear to have been the bankers not only of the partners, but for different members of the Vyse family, receiving money from them on deposit, and paying or allowing 5 per cent. interest with annual rests. They appear to have been the bankers of the partners, and to have in like manner acted as bankers for the executorship or trust estate of the testator.

The testator's property, with the exception of his villa and a few acres of freehold land near Luton, and his furniture, &c., all his available property for immediate purposes, exclusively consisted at his death of the debt due from his former partners, and out of this were paid his debts, funeral and testamentary expenses, probate and legacy duty. There was an annuity of £300 for the widow, under the will, and there was an annuity of £900 a year payable to the testator's father. In the strict performance of their duty, the executors ought to have set apart in consols or other like securities funds to meet both these annuities. But the annuitants were willing to receive, and did receive (as to the widow, up to the year 1867, and as to the father, up to his death), the annuities from the estate without requiring any investment. Under these circumstances, and not deeming it necessary to make the investments for the annuities, which would have absorbed nearly £40,000, Henry Vyse, who was really the sole acting executor, considered that as much as £90,000 could be treated as available for division among the nine surviving residuary legatees as from the testator's death, and made out the accounts accordingly, apportioning and crediting the plaintiff to and with £10,000 and interest at 5 per cent. as from that date, and she was afterwards credited with further sums as her share.

*All the other residuary legatees have, as before stated, [331 assented to, approved, and ratified what was done with their shares, so that as far as they are concerned everything must be considered lawfully and rightfully done.

The question then is reduced and confined to one of improperly leaving outstanding, on the security of the firms, the plaintiff's own share in the estate. She can be in no better and in no worse position than if she were the sole *cestui que trust* and the executors had in their hands so much trust money belong-

ing to her. Beyond all question, what was done was immensely for her benefit. From the first she had an income of £500 a year, whereas, if the trusts had been strictly carried out, she would not have had for several years anything like half that income. Still, however, she may be entitled to say that she is not to be limited to her £500 a year if her capital improperly employed produced more. Assuming her to be right in this, what would be the extent of her right as to participation in the profits of the business? She could not, of course, claim to participate in any more than the proportion which her fund, say £10,000, £11,000, or £12,000, bore to the whole aggregate capital in the business, including in such aggregate the other nine shares which her *co-cestui que trust* allowed to remain in the business, and also including any other like capital deposited by other persons therein at interest. But it was pointed out by Vice Chancellor Wigram, in the case of *Willett v. Blanford* ⁽¹⁾, and his judgment was afterwards repeated and approved of by the lords justices, that there was no rule for apportioning the profit according to the respective amounts of the capital, but that the division would be affected by considerations, of the source of the profit, the nature of the business, and the other circumstances of the case. It is obvious that it must be so, for it would be easy to suggest a number of instances in which the profit of a business has no ascertainable reference to the capital—*e.g.*, solicitors, factors, brokers, or, as was the case before the lords justices, bankers. Indeed, in almost every case where the business consists of buying and selling, the difference between prosperity and ruin mainly depends on the skill, industry and care of the dealers; no doubt also greatly on their credit [332] and reputation,* and the possession of ready money to take advantage of favorable opportunities and to enable them to abide their time in unfavorable states of the market, and also greatly on the established goodwill and connection of the house.

In this case, we know from the testator's own arrangements, and from the several arrangements made after his death in the ordinary course of business, and certainly with no eye to the present dispute, that the normal fruit of the capital was 5 per cent interest with annual rests, and that the surplus profits above that were not apportioned in any ascertainable ratio to the respective quotas of capital. For instance, in the testator's own partnership, two-sixteenths were appropriated to a partner, Thomas Andrew, without capital, an additional sixteenth to a partner, John Reynolds, with £7000 capital, three additional sixteenths to Henry Vyse with £40,000 capital, and four additional sixteenths to the deceased with £90,000 capital. The

(¹) 1 Hare 253.

reasonable explanation of this is to be found in the fact that the last three partners had been respectively engaged as partners in a previous firm with Thomas H. Vyse, the founder and head of the firm, who had relinquished his share in the property, capital, and effects of the partnership to his two sons equally, so that the three were in unequal shares the owners of the business itself, its goodwill and connection.

It was natural and reasonable therefore that, wholly irrespective of the capitals (which were expressly treated as debts bearing interest), the partner's shares in the surplus profits should be treated and dealt with with respect to their respective standing and position in the firm, the new working partner getting two-sixteenths, his next senior, who brought in his knowledge and experience and his share in the goodwill and connection, getting three-sixteenths, and the other two, who had their own previous shares and the share of their father in the business, goodwill, and connection, dividing the residue, but so as between themselves to give a slight advantage of one-sixteenth to the senior and head of the firm. The same absence of direct relation between shares of profits and shares of capital is to be found in all the subsequent arrangements, but most strikingly of all in the arrangement of 1864, when the shares of the capital and the profits were as follows: *£97,750 five- [333] twentieths; £5850, four-twentieths; £58,000, three and a half-twentieths; £21,000, two and a half-twentieths; £5000, two and a half-twentieths; nil, two and a half-twentieths.

In the face of these facts, and bearing in mind that after the first few years of a career such as that which is indicated by the successive deeds of partnership, there never could have been the slightest difficulty in paying out the plaintiff's fund, it would be very difficult to ascertain what proportion of the profits of the business is attributable to the use in the business of that fund.

But it is necessary to consider another aspect of the matter.

It was pointed out by Lord Cranworth, in *Attorney General v. Alford* ⁽¹⁾, that this court has no jurisdiction in this class of cases to punish an executor for misconduct by making him account for more than that which he actually received, or which it presumes he did receive, or ought to have received. This court is not a court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives a full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the court ever charges a trustee with more than he actually received, or ought to have

(1) 4 D. M. & G., 843.

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received, and the appropriate interest thereon. It is simply on the ground that the court finds that he actually made more, constituting moneys in his hands "had and received to the use" of the *cestui que trust*. A trustee, for instance, directly lending money to his firm is answerable for such money with full interest to the uttermost farthing; but to make him answerable for all the profits made of such money by all the firm would be simply a punishment—a punishment arbitrary and most unreasonable in this, that its severity would be in the inverse ratio of the gravity of the offense. A man squandering trust money with deliberate dishonesty in profligate extravagance would be answerable for it with 4 per cent. interest; a man lending it (at good interest) to a large, solvent, and prudent, well established firm, of which he was a partner, would be punished by a fine equal to all the profits made thereby by all his partners. Accordingly, the master of the rolls, in *Jones v. Foxall* ⁽¹⁾, held 334] that the partner could only be liable for his own *one-third of the profits of the business in which the trust moneys were; and in another more recent case, *Stroud v. Gwyer* ⁽²⁾, he held, that where the money was lent to a firm having notice of the breach of trust there was no ground for asking for the profits made. We entirely concur in these decisions, and are satisfied that no account of profits could, under any circumstances, be directed against the defendant Foster, who was simply negligent, doing nothing, and that as against the other executors each could only be properly charged with that share of the profits attributable to the plaintiff's capital which actually reached his hands.

And here another consideration intervenes. It has been distinctly laid down that a plaintiff cannot claim both interest and profits in respect of the money employed in trade, but must elect between them. And it might be a grave question whether the plaintiff must not either adopt or repudiate the terms on which the successive partnerships were willing to hold her money. If she repudiates the arrangement, it might be considered that she would have to elect between interest and that share only of the profits made in respect of her capital which actually came into the hands of her trustees, as appears to have been held in *Jones v. Foxall* ⁽¹⁾. The application, however, of that rule as to election between interest and profits to the case of an actual loan by a trustee in breach of trust to himself and others, would, we think, require very full consideration before the court came to a final decision on it. And of course, if the plaintiff is entitled to any election at all, she would have a right, at all events, to have such an inquiry and accounts as

(1) 15 Beav., 388.

(2) 28 Beav., 180.

would enable her to determine her election. We cannot, therefore, dispose of this case merely by reference to the peculiar circumstances we have pointed out, and which would seem to render it very problematical whether any very great amount of benefit, if any benefit, would accrue to the plaintiff from pursuing an investigation into the profits made. We are, therefore, obliged to consider and determine whether she has a right to such an investigation. We are not able to concur with the vice chancellor in thinking that this case is governed by any of the familiar cases to which he has referred. We have found no case at all similar to it. It is not the case of a trustee committing a direct and positive *breach of trust by selling [335 out or calling in trust moneys for the purpose of embarking them, or by actually embarking trust moneys in his hands, in any trade or speculation. It is merely the case of a body of executors not calling in from a body of traders, there being a common member of both bodies, that which was a legal debt to the testator, and which was, by the operation of the will, converted into an equitable debt, but still a debt to his estate.

Is the mere fact of the union of the three characters — debtor, executor, and trader — in the same person sufficient to entitle the estate to an investigation into the trader's own business because there has been some delay or great delay in paying off the debt? We have found no case in which this has been laid down, even in the case of a sole executor, sole debtor, sole trader. There have been hundreds, probably thousands, of cases in which traders have been executors, and in which, on taking their accounts, balances, and large balances, have been found due from them; but in no case, so far as we are aware, has it ever been held, that where there has been no active breach of trust in the getting in or selling out trust assets, but where there has been a mere balance on the account of receipts — legitimate receipts — and payments, the omission to invest the balance has made the executor liable to account for the profits of his own trade. But this case is far stronger than the case we have suggested; and if the rule as to profits were to apply to it, it would be difficult, if not impossible, to exclude from its application cases where it would shock the common feelings of mankind.

If executors were to deposit money with a bank in which one of them was a shareholder or partner, and leave it there for too long a time, it would certainly be a very startling thing if an inquiry was therefore to be made into the profits of the bank, and still more startling if the deposit had been made by the testator himself, and there had been simply delay in calling it in. We are unable to distinguish on principle that case from this.

In fact, the firm were bankers allowing 5 per cent. interest on the deposits. That which was a debt at the death of the testator continued exactly the same debt throughout, available for the purposes of the estate, and was in fact as ready when called for the payment of the debts and legacies and of the residuary leg-
336] atees *as if it had been at the London and Westminster Bank. There was always an executor not in the firm who could have called in the money. If there had been any concerted breach of trust, any fraudulent or improper intention — if there had been any deception or concealment, the case would have been very different. But the fact that this money was in the hands of the firm was known to all the family. The plaintiff became of age four years before she filed her bill, and if she did not know (which we think not very probable), she had nothing to do but to ask, where her fortune was, and she might then have called on her trustees to act. And the other surrounding circumstances, so far from being unfavorable, are in the highest degree favorable to the trustees. The debtors were a solvent and most prosperous firm; the money of the plaintiff was left outstanding, just as the trustees left their own accumulated savings to an immense amount, on the same security and the same terms; and we are satisfied that the trustees acted in the most perfect good faith and in the well warranted belief that, in omitting to call in the plaintiff's money, they were doing what she, if she were of full age, would have only been too glad that they should do.

We think, therefore, that the decree of the vice chancellor must be varied in so far as it directs an account of profits and payment thereof. We are also of opinion that the vice chancellor's decree should be varied in another respect. He has directed that a sum of £1600, part of the testator's personal estate, laid out in erecting a villa on part of his real estate directed to be sold, should be wholly dissallowed in their accounts. This sum was laid out by the trustees *bonâ fide*, under advice, as a means of facilitating the sale and increasing the value of the land near Luton as building ground. The house so built has been let for £80 a year, and the rest of the land, with the exception of a minute portion, has been sold and realized £3456, and the villa itself is saleable. As the real and personal estate constituted one fund, we think it neither reasonable nor just to fix the trustees with a sum, part of the estate, *bonâ fide* laid out on other part of the estate in the exercise of their judgment as the best means of increasing the value of the whole. If they were mistaken in this, which does by no means appear, the ut-
337] most they could be *fairly chargeable with would be the loss, if any, occasioned by the mistake in judgment. The plaint-

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iff's share in that loss must be so minute as not to justify the expense of any litigious inquiry in chambers as to it. If the plaintiff prefers it, the trustees, being willing, may be ordered, as between them and her, to take the villa themselves, as at the price of £1600 and the value of the site as unbuilt on, as to which an affidavit may be produced to us. There can be no substantial question as to this, as the prices realized for the adjoining plots are known. These matters being disposed of, and the other residuary legatees being content with what has been done, the further prosecution of the suit ought to be unnecessary. But in form the plaintiff is entitled, if so advised, to have a common decree for the usual accounts of the estate, with a direction to ascertain her share of the net residue, the defendants to be charged with 5 per cent. interest on the amount from time to time in the hands of the successive partnership firms and to be allowed like interest on all payments properly made to or for her; and such account to be taken with annual rests.

If there is to be further litigation, the further consideration and costs must continue to be adjourned. But if the matter rests, as it ought to rest, here, we will allow the matter to be again mentioned to us, and dispose of the costs.

Solicitors: Messrs. *Fox & Robinson*; Messrs. *Gregory, Rowcliffes, & Raule*.

Where the surviving partner continues to use the capital of his deceased partner in the business he may be charged with a proportionate share of the profits during the time it is so used instead of with interest. *Booth v. Parks*, 1 Molloy, 465; *Brown v. De Tastet*, Jacob's Chy., 284, as explained in 4 Russell, 126; *Simmons v. Leonard*, 3 Hare, 581; *Wedderburn v. Wedderburn*, 22 Beav., 84; 2 Keen, 722; 4 Myl. & Cr., 41; 2 Beav., 208; 17 Beav., 158; 18 Beav., 465; *Featherstonhaugh v. Fenwick*, 17 Ves., 298; *Waring v. Crane*, 1 Parson's Select Eq. Cas., 516, 522; *McKnight v. Walsh*, 23 N. J. Eq., 137; *Long v. Majestre*, 1 Johns. Chy., 305; *Washburn v. Goodman*, 17 Pick., 519; *Ogden v. Astor*, 4 Sandf., 311; *Barfield v. Loughborough*, L.R., 8 Chy. App., 1, ante p. 712, 718, note. *Marjorum v. Sunderlandford*, 1 Romilly's Notes of Cas., 110 and note p. 114; *Cass v. Abeel*, 1 Paige, 393, 396-7, note to second edition; *Chambers v. Howell*, 11 Beavan, 6; Parson on Partnership, 443, marg. p.

And so of the rents and profits of real

estate owned by the partnership. *Smith v. Walker*, 40 Cal., 385.

But a proper allowance should be made for the management and care of the business and such allowances are in some cases very liberally made. *Brown v. De Tastet*, Jacob's Chy., 284, 297, as explained, 4 Russell, 126; *Cooke v. Collingridge*, Jacob's Chy., 622-4; *Waring v. Crane*, 1 Parson's Select Eq. Cases, 522; *Featherstonhaugh v. Turner*, 25 Beav., 382.

Although if there be fraud or other improper practices by the survivor, such allowances may be refused. 1 Romilly's Notes of Cases, 115. *Burden v. Burden*, 1 Ves. and B., 170; *Stocken v. Ducson*, 17 L.J. Ch., 282, affirming 6 Beavan, 371.

And if the survivor is charged with profits he is entitled to deduct for bad debts. *Washburn v. Goodman*, 17 Pick., 519.

And so for the amount properly paid a clerk or proper assistant, by a share of the profits. *Hall's Appeal*, 40 Penn. St. R., 409.

But there is no absolute rule that the survivor shall be charged with profits. The principle of division may be affected by considerations of the source of the profits, the nature of the business and all the circumstances of each particular case. *Willett v. Blanford*, 1 Hare, 253, 265-9; *Wedderburn v. Wedderburn*, 22 Beav., 84; 1 Romilly's Notes of Cases, 116-118; *Simpson v. Chapman*, 4 De Gex., MacNaghten & Gordon, 154.

Where the good will belongs to the survivor, he will not be charged with profits resulting from that. *Wedderburn v. Wedderburn*, 22 Beav., 84.

It is doubtful whether the good will of the business, in the absence of a provision upon the subject, is partnership assets. *Holden v. McMakin*, 1 Parson's Select Eq. Cases, 270, Parson's on Part., 2d ed. 444 marg. p.

Where two out of three partners dissolve the partnership and form a new co-partnership the third, if insolvent and indebted to the firm, cannot claim a share of the profits of the new firm. *Hyde v. Easter*, 4 Maryland Ch., 80.

Instead of profits, the survivor may be charged with interest at the legal rate. *Washburn v. Goodman*, 17 Pick., 519; 1 Romilly's Notes of Cases, 117; *McKnight v. Walsh*, 23 N. J. Eq., 137.

The right to profits may be lost by laches of the representatives of the deceased. *Clements v. Hall*, 2 De Gex & Jones, 173; 1 Romilly's Notes of Cases, 117; *Smith v. Drake*, 23 N. J. Eq., 302.

If there be a clause in the articles relative to a purchase, by the survivor, of the interest by the deceased, it may be enforced. *Essex v. Essex*, 20 Beav., 442; *Simmons v. Leonard*, 3 Hare, 581; *Case v. Abel*, 1 Paige, 393.

And so the survivor may in good faith purchase the interest of the deceased from his representatives. *Chambers v. Howell*, 11 Beav., 6, 13.

Although if a widow be also the representative she must sell in the latter and not the former character. *Smith v. Walker*, 38 Cal., 389-391.

In case the agreement contain a clause that on the death of one partner an account shall be taken and his interest ascertained when the survivor may purchase at the amount ascertained, unless

the survivor take and render an account and ascertain the interest of the deceased he may be charged with profits. *Simmons v. Leonard*, 3 Hare, 581; but see *Carroll v. Alston*, 1 South Car. Rep. N. S. (1 Rich.), 8.

The survivor is liable for interest or profits if he do not render a fair and just account of the partnership assets. The rendition of an account is no defense if he fraudulently conceal the true state of the partnership affairs. *Ogden v. Astor*, 4 Sandf., 311.

A sale by executors to the survivor for the purpose of a resale to one of the executors is fraudulent and the executor so purchasing will be charged with interest or profits. *Cooks v. Collingridge*, Jacob's ch., 607; *Washburn v. Goodman*, 17 Pick., 519; See also *Townsend v. Townsend*, 1 Giffard, 201. But such sale is voidable in equity and not void at law and may be allowed to stand if no fraud. *Colgate v. Colgate*, 23 N. J. Eq., 372.

The sale of the partnership assets by the survivor must be in good faith and for cash. *Crawshaw v. Collins*, 15 Ves., 237; 1 Jacob and Walker, 267; *Featherstonhaugh v. Fenwick*, 17 Ves., 310; *Wild v. Milne*, 26 Beav., 505; *Dickinson v. Dickinson*, 29 Conn., 607.

The court may, after a reference as to the propriety thereof, allow the survivor to purchase. *Crawshaw v. Maule*, 1, Swanston, 495, 530; *Colgate v. Colgate*, 23, N. J., Eq., 372.

Where there are two surviving partners and one subsequently die, the representatives of the latter may be joined with the survivor in a suit for an accounting and payment of what the deceased survivor may have received. *Sortore v. Scott*, 6 Lansing, 276; but see *Davies v. Davies*, 2 Keen, 534.

The suit to charge the survivor with profits must be by the representative of the deceased in a court of equity. After recovery thereof the probate court may decree distribution thereof but it has not jurisdiction to try the right to profits as that must be determined upon equitable principles by a court having equitable powers. *Smith v. Walker*, 38 Cal., 392; *Stewart v. Burkhalter*, 28 Miss., 896.

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A.

ABANDONMENT.

Of right of drip from eaves of building. 392, 396 *note*.

ABDUCTION.

See CRIMINAL LAW, 521, 523 *note*.

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ADMIRALTY.

1. It is the general practice for steam vessels going down the river Thames to keep on the north side. If, therefore, a vessel rounding a bend on the north side, under a port helm, on her way up the river, sees the red light of one rounding the same bend on her way down, over her starboard bow, and nearer the north side than she is herself, she is not justified in upposing that the vessel coming 'own will cross her north, and pass her on her port side.
2. Vessels, under these circumstances, are not crossing vessels within the meaning of the 14th article of the Steering and Sailing rules. *Malcomson v. General Steam Navigation Co.* 183
3. Art. 16 of the Rules and Regulations for preventing collisions at sea provides, that "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall in

a fog go at a moderate speed." A steamship navigating in a fog at a moderate speed hearing a whistle sounded many times, indicating that a steamer was approaching her, and had come very near to her, so near that if the vessels had then been stopped they would have been within hailing distance, is bound under the 16th Article not only to stop the motion of her engines, but to reverse them, so as to stop the motion of the vessel, and ought not to wait until the vessels sight each other, when such a manœuvre may be too late. *Morton v. Hutchinson.* 191

4. Plaintiff shipped bark on board defendants' general ship, under a bill of lading, from Santa Martha to London, by which average, if any, was to be adjusted according to British custom. When the ship was about to sail a fire broke out in the forehold, and pumping water through the deck of the forecastle not being sufficient to extinguish the fire, a hole was cut in the side of the ship, and, her fore compartment being thereby filled with water, the fire was extinguished. If this course had not been adopted the cargo on board would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. The plaintiff's bark was destroyed by the water poured into the ship.

In an action for general average contribution in respect of the destruction of the plaintiff's bark, it was found, in addition to the above facts, that it is the practice of British average adjusters to treat a loss so caused as not a general average loss:

Held, that the loss was, according to the general law of England, the subject of general average contribution, as a voluntary and intentional

sacrifice of the bark made under pressure of imminent danger, and for the benefit and with the view to secure the safety of the whole adventure then at risk.

5. But, secondly, that the plaintiff, by the terms of the bill of lading, had made the admitted practice of British average adjusters part of the contract; and he was bound by it, although erroneous. *Stewart v. West India, etc., Steamship Co.* 229

6. It was agreed by charterparty between plaintiffs and defendants that the plaintiffs' ship should proceed direct to any Liverpool or Birkenhead dock, as ordered by the defendants, and there load in the usual and customary manner a cargo of coals, the vessel to be loaded at the rate of 100 tons per working day. The defendants directed that the ship should proceed to the W. dock, at Liverpool. Cargoes of coal are supplied at the docks at Liverpool through the agency of the agents for various collieries, and are most usually loaded in the W. dock from "tips," of which there are only two in the dock, and by the dock regulations no coal agent is permitted to have more than three vessels in the dock at a time. Though coal is generally loaded in the W. dock from tips, it can be, and not unfrequently is, loaded from lighters. The plaintiffs' ship was ready to go to into the dock on the 3d of July, but was not allowed to enter because the coal agents employed by the defendants to supply the cargo had three vessels already in the dock, and two others in turn to go in. She was allowed to go into the dock on the 11th of July, but could not get under the tips for some time owing to the number of vessels in turn to go under them before her:

Held, in an action for demurrage on the charterparty, that the lay days did not commence at the time when the ship was ready to enter the dock, as contended by the plaintiffs, nor at the time when she got under the tips, as contended by the defendants, but at the time when she got into the dock. *Tapscott v. Balfour.* 316

7. A charterparty made by plaintiff to defendant contained the following clause: "Charterer's liability to cease when the ship is loaded, the captain

having a lien upon the cargo for freight and demurrage." In an action brought for demurrage at the port of loading:

Held, 1. That the lien extended to demurrage at the port of loading, as well as at the port of discharge. 2. That the ship having been loaded, the charterer could not be sued for demurrage incurred during the loading. *Franco v. Massey.* 475

8. A schooner, close hauled on the starboard tack at night, saw the starboard light and the two towing lights of a steam-tug three points on her port bow about a mile off. The schooner kept her luff. The steam-tug had a fully laden ship in tow, and was steaming against a head wind in the open sea. The steam-tug kept her course until it was too late to get out of the way of the schooner and the steam-tug and the schooner came into collision:

Held, that the schooner was right in holding her course, and that the steam-tug was alone to blame. *The Warrior.* 606

9. Two vessels came into collision on the high seas. One of the vessels (a bark) received damage, and all her crew, except her mate, escaped on board the other vessel. The mate of the bark remained on board her, and navigated her until he obtained assistance from a steam vessel. The steam vessel then took the bark in tow and brought her into port in safety, the mate still assisting in her navigation:

Held, that in awarding salvage to the owners, master, and crew of the steam vessel, the right of the mate of the damaged ship to claim salvage reward for his services should be taken into consideration, and that the mate, upon his claim being brought before the court, was entitled to rank as a salvor. *The Le Jonet.* 611

10. A steam vessel laden with a general cargo became disabled at sea in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading which contained among the excepted perils "accidents from machinery." Another steam vessel belonging to the same owners fell in with the disabled vessel and towed her into safety:

Held, that the owners of the vessel rendering the service were entitled to recover salvage remuneration against

the cargo laden on board the disabled vessel, and that the master and crew of the vessel rendering the service were entitled to recover salvage remuneration against the disabled vessel, her freight and cargo. *The Miranda*.

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11. A charterparty was entered into between an English firm and a Hamburg firm, the owners of the R., a vessel belonging to Hamburg. The charterparty provided that the vessel should proceed to a foreign port and there load a cargo, and therewith proceed to a port within certain limits mentioned—the act of God, the queen's enemies, restraint of princes and rulers, and dangers of the seas excepted. It was provided that the master should sign bills of lading as required, but at not less than the chartered rate, without prejudice to the charterparty. The plaintiffs, with full knowledge of the terms of this charterparty, shipped a cargo at the port of loading under bills of lading by which it was provided that the goods should be delivered at a port within the limits mentioned in the charterparty as ordered, the dangers of the seas only excepted. After the making of the charterparty, and the shipment of the goods, war broke out between the North German Confederation and France. The ship on her homeward voyage sustained damage at sea, and was compelled to put into a neutral port for necessary repairs, and there finding that French cruisers were in the vicinity, she remained for a long time after the necessary repairs were completed, in order to avoid the risk of capture. The risk of capture was such as to render it reasonable and prudent for the master, having regard to the preservation of his ship, to remain in port. On the departure of the cruisers the master sailed on his voyage, and delivered the cargo according to orders, at an English port within the limits mentioned in the charterparty. In a suit brought by the plaintiffs to recover damages for the delay incurred in order to avoid risk of capture:

Held, that the delay was justifiable.

13. *Semble*, that the single exception of dangers of the seas mentioned in the bill of lading did not, under the circumstances, exclude the other exceptions mentioned in the charterparty. *The San Roman*.

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14. A charterparty, written in the English language, but entered into at Constantinople between freighters who were subjects of the North German Confederation, resident there, and the master of a North German vessel owned by subjects of the North German Confederation, provided that the vessel should proceed to Taganrog, and there take on board a cargo as therein mentioned, to be carried to Queenstown, Falmouth, or Plymouth for orders, and thence to a safe port in the United Kingdom, or a safe port on the continent between Havre and Hamburg, both inclusive, or as near thereunto as he could safely get, and deliver the same on being paid freight as therein mentioned, the act of God, the queen's enemies, restraint of princes and rulers, among other perils therein mentioned, excepted. In pursuance of the terms of the charterparty the vessel proceeded to Taganrog, and a cargo, as agreed, having been shipped on board, bills of lading were signed by the master of the vessel, under which the cargo was to be delivered at a safe port in the United Kingdom or on the continent, as per charterparty, the act of God and the queen's enemies excepted. On the 28th of June, 1870, the vessel sailed on her voyage with the cargo to Falmouth one of the ports of call mentioned in the charterparty, and on the 16th of August put into Algeiras in order to obtain a supply of water. She there learnt, as the fact was, that since she had sailed from Taganrog a war had broken out between France and the North German Confederation, and was still existing. In order to avoid capture by the French cruisers the vessel proceeded to Gibraltar, where she arrived on the 15th of August, and remained there with her cargo on board till the 2d of February, 1871, when, after receiving news that an armistice had been concluded between France and the North German Confederation, she sailed for Falmouth and delivered her cargo, according to orders, in London. Whilst the vessel was lying at Gibraltar her master was requested by the owners of cargo to proceed on his voyage, and if he would not do so, then to tranship and forward the cargo to its destination at the expense of his owners, but no tender of freight and expenses was made, such as according to German law was necessary to entitle the owners of the

cargo to demand its transshipment. The war continued until January, 1871, and if the vessel had left Gibraltar during the war she would have run great risk of capture from French cruisers:

Held, that under the circumstances the master was justified in proceeding with his ship to Gibraltar, and keeping her there with her cargo on board during the continuance of the war.

15. *Semble*, the law to be applied to the execution of the contract was North German law. *The Express*. 332

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AGREEMENT.

1. The defendant covenanted with the plaintiff not to carry on the business of a publican within half a mile of the plaintiff's premises. He afterwards carried on business within half a mile, if the distance were measured in a straight line, "as the crow flies," but not within half a mile if the distance were measured by the nearest mode of practicable access:

Held (affirming the judgment of the court below), that there had been a breach of the covenant. *Moufet v. Cole*. 429

2. The defendants, by charterparty, agreed with the plaintiff that their ship should, at a specified time load 1300 tons of coals in the river Tyne,

to be carried to Havre for the plaintiff. They broke their contract, and the plaintiff had, in consequence, first to hire other vessels at an advanced freight, and, secondly, to buy the 1300 tons of coal at an enhanced price. He was unable, according to the custom of the colliery trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage the defendants admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in price at the pit's mouth was not disputed; but it was not directly proved that there had been an equivalent rise at Havre.

Held, that the fact of the plaintiff having paid the additional price was *prima facie* evidence of damage to that extent, and entitled him, in the absence of evidence to the contrary to recover. *Featherston v. Wilkinson*. 493

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The court for Divorce, acting upon the principles and rules in operation formerly in the Ecclesiastical Courts, will allow a petition for permanent alimony to be filed after it has made a final decree for judicial separation. *Covell v. Covell*. 947

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ASSIGNEE.

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ASSIGNMENT.

1. An officer in a regiment assigned the money to arise from the sale of his commission to two assignees separately. He obtained leave to sell out and the two assignees gave to the agents of the regiment simultaneous notices of their incumbrances. £450, forming part of the money which the officer would receive, came from a particular fund in the hands of the agents, held by them subject to the directions of the Horse Guards. Six days after the notices had been given, a letter was sent from the Horse Guards — the purport of which was communicated by the agents to the officer — requesting the agents to transfer £450 from the fund to the officer. The first assignee then gave a second notice. The agents sent a form of receipt to the officer, which was returned by him signed before which the £450 was not issuable by the agents. The second assignee then gave a second notice:

Held (reversing the decision of the master of the rolls), that the first assignee had priority over the second assignee.

2. Where a mortgagee appeals from the decision of a court below, and the decision is reversed, he will be allowed to add his costs of the appeal to his mortgage charge. *Addison v. Cox.* 765

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ASSIGNOR.

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B.

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BANK.

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BANKRUPTCY.

1. By s. 164 of the Bankruptcy Act, 1861, a promise to pay a debt barred by the certificate of discharge is made void. By s. 20 of 32 & 33 Vict. c. 83 the whole of the act is repealed; but the repeal is not to affect the past operation of any enactment repealed, or affect any right accrued or restriction imposed before the commencement of the act by or under any such enactment.
2. A debtor and his creditors entered into a deed of composition while the act of 1861, was in operation, which deed was to have the effect on his debts as if the debtor had been discharged in bankruptcy. After the repeal of the statute by the above section, the debtor gave a bill of exchange to one of his creditors, who was barred by the composition deed for his old debt:
Held, that the operation of s. 164 upon this transaction was preserved by the saving clause in s. 20; and the bill was therefore void. *Rimini v. Van Praagh.* 196
3. The defendant received from M., a member of a trading firm, a bill of lading for brandy, for the purpose of

landing and warehousing it, which he did, entering the brandy (at M.'s request) in his own name, and paying charges amounting to 47*l.* Afterwards, and whilst he still had the bill of lading in his possession, an acceptance which had been given by the firm to the defendant for the hire of a ship falling due, and the firm not being able to meet it, the defendant consented to take M.'s acceptance at seven days for a balance of account, including the hire and the 47*l.*, upon receiving M.'s authority to sell the brandy, if the bill were not met. This acceptance not being met, the defendant sold the brandy. The firm were afterwards adjudicated bankrupts, and the trustee sued the defendant in trover for the value of the brandy. The transaction was *bona fide*, but the brandy formed in fact the whole property of the firm.

Held, that the transaction under which the defendant obtained power to sell the brandy was not a "fraudulent conveyance gift, delivery, or transfer," within the meaning of the Bankruptcy Act, 1869, s. 6, subs. 2. *Philps v. Hornstedt.* 424

7. On the 23d of September H. discounted for P. two bills of exchange payable on the 12th of October, and P. gave H. a bill of sale as security, requesting him not to register it unless the bills were dishonored at maturity. H. accordingly did not register it. On the 12th of October the bills were dishonored, on which H. took them up and P. gave him two fresh bills for the same amount, and a new bill of sale of the same chattels. On the 30th of October the new bills were dishonored, and H. gave directions to take possession of the chattels. Early on the 31st a broker went to take possession, but could not on that day get into the house where they were. On the same day the bill of sale was registered, and P. committed an act of bankruptcy by filing a petition for liquidation, on which he was subsequently adjudged bankrupt. On the 1st of November H. obtained possession of the goods:

Held (reversing the decision of the registrar), that the goods belonged to H. and not to the trustee in bankruptcy, for that they were not in the order and disposition of the bankrupt with the consent of the true owner at the time of the act of bankruptcy;

that the Bills of Sale Act did not apply; and that the transaction was not invalid as being a scheme to evade the provisions of that act. *Matter of Harris.* 750

5. Where a suit would, but for the fact of a bankruptcy, be fit to be entertained by the Court of Chancery, the jurisdiction is not taken away by the bankruptcy act, 1869. Therefore when a trustee in bankruptcy has, in respect of the bankrupt's estate, a claim against a third person, that claim may be prosecuted at law or in equity, and is not subject to the jurisdiction of the Court of Bankruptcy. *Ellis v. Silber.* 771

6. When the state courts have jurisdiction of an action by an assignee in bankruptcy. 775, *note.*

7. L & Co. employed S. & Co. as their correspondents at Havana, and R. as their correspondent in London. They consigned certain cargoes to S. & Co at the same time informing them that that they would draw bills on R. for the value. This they accordingly did, and the bills were accepted by R. Before the bills came to maturity S. & Co. sent remittances in short bills, to R. to cover the amount of the bills, telling him to take them "against the acceptances." R. became bankrupt, and the acceptances were not paid, and soon after S. & Co. became insolvent:

Held (affirming the decision of Bacon C.J.), that the remittances must be applied to meet the acceptances, under the rule of *Ex parte Waring.*

8. It is no objection to the application of the rule in that case that the party sending the remittances was not a party to the bills as drawer or indorser, provided the bills were drawn in respect of a transaction in which he is liable. *Matter of Smart.* 855

9. A creditor who has received money from a bankrupt by way of fraudulent preference, and has been ordered to repay it to the trustee of the bankrupt's estate, is not a person holding money in a fiduciary capacity under the 4th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and cannot, therefore, be committed to prison under that section.

10. The 9th section of the Debtors Act, 1869, does not preserve to the Court of Bankruptcy any powers of imprisonment for debt which have been taken away from other courts by the act. *Hoosen, Matter of.* 863

11. L. being on the eve of bankruptcy, drew out all his balance at his bankers and sent it to K., who was employed by him as accountant, and to whom he owed a considerable sum. His object in sending the money to K. was to prevent its being attached by another creditor who had issued a writ against him. K. took back the money, and refused to accept it unless the debtor consented to his paying himself out of it. After some discussion, the debtor agreed to this, and K. accordingly appropriated £421, part of the sum entrusted to him, in satisfaction of his own debt. The evidence did not establish that there had been anything which amounted to pressure for payment on the part of K. before the occasion on which he took back the money to L. Three days afterwards L. stopped payment, and soon afterwards presented his petition for liquidation:

Held, that the act of the debtor in drawing out the balance from the bankers for the purpose of defeating the creditor who was suing him was in itself an act of bankruptcy, and that the payment of the £421 to K. was a fraudulent preference. *Halliday, Matter of.* 893

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TRUST, 826.

VENDOR AND VENDEE, 822, 899.

BIGAMY.

See CRIMINAL LAW, 527.

BILL OF EXCHANGE.

See BILL OF LADING, 724.

BILL OF LADING.

1. Corn merchants in California agreed to send cargoes of wheat to a miller in England, the reimbursement to be by his acceptance against bill of lading. The corn merchants shipped a cargo, and made out the bill of lading in six

parts. Three parts, with corresponding bills of exchange drawn on the miller for the price of the cargo, were indorsed by the corn merchants, and transferred to a Californian bank for valuable consideration. These bills of exchange were, with the bills of lading annexed, accepted by the miller. One indorsed part of the bills of lading was inadvertently sent by the corn dealers to the miller, and by him transferred to an English bank for valuable consideration. The bills of exchange were not met by the miller:

Held, that the corn merchants were entitled to deal as they did with the cargo by transferring the bills of lading; that the English bank could not, under the circumstances, claim as holders of the bill of lading without notice; and that the English bank had no priority.

2. *Quære*, whether the miller might not have refused to accept the bills of exchange unless the bills of lading were delivered to him. *Gilbert v. Guigon.* 724

See ADMIRALTY, 229, 621.
BANKRUPTCY, 855.
CARRIER, 343, 358, *note*.

BONA FIDE.

See ASSIGNMENT, 765.
BILL OF LADING, 724, 855.

BREACH.

See VENDOR AND VENDEE.

BROKER.

See SET OFF 290.

C

CANAL COMPANY.

See NEGLIGENCE, 208.

CARRIER.

1. The plaintiffs delivered to the defendants, for carriage on board the defendants' ship, a closed case con-

to nung silk goods. The bill of lading, as tendered by the plaintiffs for signature, described the contents of the case as linen goods; but before signing it the captain impressed upon it with a stamp the words "weight, value, and contents unknown." The freight charged for silk was higher than that for linen goods, and the freight paid for the goods so delivered was that for linen goods; but the plaintiffs represented the goods to be linen inadvertently and without fraudulent intention. On the ship's arrival at her destination it was found that two pieces of silk had been abstracted from the case.

In an action by the plaintiffs against the defendants as common carriers for non delivery of the silk goods so lost:

Held, that the result of the addition of the words "weight, value, and contents unknown" to the bill of lading was completely to do away with the effect of the description of the goods as linen, and that consequently the defendants' contract was carry the case and its contents, whatever they might be; and the plaintiffs were entitled to maintain the action.

2. *Quare* whether, even without the additional words, the misrepresentation having been made without fraud could have had the effect of avoiding the contract for carriages of the goods by the defendants as common carriers. *Lebeau v. General Steam Navigation Co.* 343, 353, note.

8. The plaintiffs, being shoe manufacturers at Kettering, were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4s. per pair, an unusually high price. The shoes were to be delivered by the 8d of February, 1871, and the plaintiffs accordingly sent them to the defendants' station at Kettering for carriage to London in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station master (which for the purposes of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 8d, and that unless they were so delivered they

would be thrown on their hands; but he was not informed that there was anything exceptional in the character of the contract. The shoes were not delivered in London till the 4th of February, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2s. 9d. a pair, which in consequence of the cessation of the French war, was, apart from the previously mentioned contract, the best price that could have been obtained for them, even if they had been delivered on the evening of the 8d of February, instead of the morning of the 4th.

In an action against the defendants for the delay in delivering the shoes, they paid into court a sufficient sum to cover any ordinary loss occasioned thereby, but the plaintiffs further claimed the sum of 287l. 3s. 9d., the difference between the price at which they had contracted to sell the shoes and the price which they ultimately fetched:

Held (per Kelly, C.B., Blackburn, J., Mellor, J., Martin, B., and Cleasby, B., Lush, J., and Pigott, B., dissenting), that the plaintiffs were not entitled to recover the latter sum, the damage not being such as might reasonably be considered as arising naturally from the defendants' breach of contract or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract:

Per Kelly, C. B., Blackburn, J., and Mellor, J., and Cleasby, B., the notice given to the defendants was not such that they could reasonably be supposed to have had in their contemplation, at the time of entering into the contract for the carriage of the shoes, damages of such an exceptional nature as those claimed:

Per Martin, B., and, *semble*, per Blackburn, J., and Lush, J., a mere notice as such could not have the effect of rendering the defendants liable to more than ordinary damages; but it must in order to do so be given under such circumstances as to make it a term of contract, that the defendants will be liable for such damages if the contract be broken:

Per Lush, J., and Pigott, B., the notice given to the defendants was sufficient to put them upon inquiry as to the nature of the contract which the plaintiffs were under, and if they chose to accept the goods for carriage

without further inquiry, they took the risk of what the contract might turn out to be, and were liable to the plaintiffs for the loss actually occasioned. *Horne v. Midland Railway Co.* 369

4. A railway company carrying passengers and goods partly by railway and partly by their own ships, is entitled to the limitation on the liability of shipowners imposed by the Merchant Shipping Acts.

5. A railway company, known to be also shipowners, contracted to carry passengers and goods from London to Guernsey. The passengers and goods were taken by railway from London to Southampton, and were there put on board a ship which belonged to the company. The ship on her way to Guernsey, came into collision with another ship and sank, with several of the passengers and all the goods. Actions were brought against the company by surviving passengers for loss of luggage and for delay, by shippers of goods for loss of goods, and by the administrators of lost passengers for damages:

Held, that, as to all the damages (except those for delay), the liability of the company was, by the Merchants Shipping Acts, limited to the amount of £15 per ton on the tonnage of the ship; that the amount so payable should be distributed by the Court of Chancery, and that all the actions against the railway company (except those for delay) should be restrained. *London and South Western Railway Co. v. James.* 869, 879, note

**See ADMIRALTY.
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CHAMPERTY.

I. Declaration, that J. H., a brother of defendant and a cousin of plaintiff, had died, leaving large real and personal

property; that defendant was heir-at-law of J. H., and one of his next of kin; that J. H. left a will whereby his real and personal property was left to persons other than plaintiff and defendant, and plaintiff believed that the will revoked a former will by which J. H. had bequeathed property to plaintiff; and that in consideration that plaintiff would take the necessary steps to contest the will and would advance money and obtain evidence for such purpose and instruct an attorney, defendant promised to share with plaintiff half the real and personal property which might come to defendant by reason of such proceedings:

Held, that the agreement amounted to champerty; and that the fact, that the plaintiff was a relation of the defendant and had some collateral interest in the suit, did not prevent a contract, by which he was to receive half of what the defendant recovered, being champerty. *Hutley v. Hutley* 245

CHARITY.

See WILLS, 90.

CARTERPARTY.

See ADMIRALTY, 316, 475, 621, 632,

CHattel MORTGAGE.

See FRAUD, 830.

CHILDREN.

See DIVORCE, 674.

PARENT AND CHILD.

COLLISION.

See ADMIRALTY, 183, 191, 608.

RULES FOR PREVENTING, 641.

COLONIES.

When law of England as to partnership prevails in India. 121

COMMISSION MERCHANT.

See SET OFF, 290.

COMPENSATION.

See NEGLIGENCE, 208.

COMPROMISE

See STOCKHOLDERS, 1, 16.

CONFESSION.

See CRIMINAL LAW, 517, 530.

CONNIVANCE.

See DIVORCE, 657, 662 *note*.

CONSENT.

See CRIMINAL LAW 512, 559.

CONSIGNOR AND CONSIGNEE.

See BANKRUPTCY, 855.

BILL OF LADING.

CONSPIRACY.

See CRIMINAL LAW, 241, 564.

CONSTRUCTION.

See STATUTE, 176.

WILL.

WORDS.

CONTEMPT.

1. By 9 & 10 Vict. c. 95, s. 3, the county courts were established and were made courts of record. By s. 113 the judge is empowered to impose a fine not exceeding £5, or to imprison for a term not exceeding seven days, for any contempt committed in court.

Held, that the jurisdiction of the judge of a county court was confined by s. 113 to contempts committed in court; and he had no power to proceed against a person for a contempt committed out of court.

2. *Semble*, that inferior courts of record have only power over contempts *in facie curiæ*. *The Queen v. Lefroy*, 250, 251, *note*.

See DIVORCE, 674.

CONTRACT

See AGREEMENT.

CONVERSION.

See TROVER, 497.

COPYRIGHT.

1. The plaintiffs are the proprietors of a weekly periodical called "*Punch*." Between the years 1849 and 1867 they published in nine several numbers nine cartoons, with descriptive writing underneath them with reference to the Emperor Napoleon III. In 1871 the defendant published a work called "The Man of his Time," consisting, first, of the "Story of the Life of Napoleon III., by James M. Haswell;" and, secondly, of "The same Story as told by Popular Caricaturists of the last Thirty Years." Among the caricatures in part 2, were copies in a reduced form, sometimes with and sometimes without the descriptive writing, of the nine cartoons above mentioned. No consent from the plaintiffs to this reproduction had been obtained. In an action by them for infringement of their copyright in the several books or "sheets of letter-press" containing the cartoons:

Held, that a substantial part of the plaintiffs' books, or sheets of letter-press, had been appropriated, and that they were entitled to recover. *Bradbury v. Hotten*. 412

CORPORATION.

1. Though a corporation may have by statute a power to remove one of its officers holding a freehold office, the Court of Queen's Bench will see that that power is exercised in a lawful manner, and will interfere if it should not be so. But if exercised in a lawful manner that court will refuse to interfere on the mere ground that the power has not been wisely or discreetly put in force in the particular case.
2. In the case of removal from office of an officer of the corporation, upon an accusation of inability or neglect of duty, if there has been such evidence given as on an ordinary trial would jus-

tify the judge in leaving it to a jury to say, as a matter of fact, whether the accusation was made out, the court will not interfere with the decision arrived at by the corporation.

3. A corporate body having the power to dismiss one of its officers, holding a freehold office, on complaint against him, referred to a committee of its own body the task of examining into the complaint, and receiving evidence upon it and reporting thereon. The committee performed this duty. The report and evidence were duty furnished to the inculpated officer, who was then called on for his defense. He was afforded the opportunity of being heard, and counsel was heard, for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office:

Held, that this was not a case of delegation of lawful authority, but was a due exercise of that authority by the corporate body itself.

Per LORD COLONSAW: The proceedings in this case were not to be assimilated to a criminal proceeding, but were to be treated in the nature of an official inquiry.

4. The 13 and 14 Vict. c. 61, gave to the lord chancellor the power to remove from office the registrars of county courts. The 15 and 16 Vict. c. lxxvii. (local), declared the mayor, aldermen, and commons, in Common Council assembled, entitled to appoint the chief clerk of the London (city) small Debts Court, and "for inability or misbehavior, or for any other cause which may appear reasonable to the mayor and council, to remove" the said clerk. The 19 and 20 Vict. c. 108, directed previous county court statutes to be read as part of that statute, and that the chief clerk of a county court should thenceforth be called "the registrar." The 28 and 29 Vict. c. 99 (regulating county courts in general), directed that the chief clerk and chief bailiff of the city court should thenceforward be styled the registrar and the high bailiff, and that the city court should have the same powers, etc., as a metropolitan county court; and it also incorporated with itself all the preceding public statutes relating to the county courts:

Held, that the specific enactment in the 15 and 16 Vict. c. lxxvii. (local), as to the power of amotion from the office of registrar to be exercised by the mayor, etc., in common council

assembled, was not taken away by the effect of the general statutes, but still existed in that body :

Held, also, that "reasonable" cause in the act meant "just cause." *Osgood v. Nelson.* 27, 43 *note*.

See PRINCIPAL AND AGENT, 256.
STOCKHOLDERS.

CORPORATOR.

Removal and restoration of, 27, 43, *note*.

COSTS

When mortgagee will be allowed to add the costs of a litigation to his mortgage. 765

See FORMER SUIT, 302, 316 *note*.

COUNTERCLAIM.

See SET OFF, 419, 424 *note*.

COVENANT

See AGREEMENT.

CRIMINAL LAW.

1. ABDUCTION.

One who takes an unmarried girl under the age of sixteen years out of the possession and against the will of her father or mother, is guilty of an offense, 24 & 25 Vict. c. 100, s. 55, although he may not have had any bad motive in taking her away, nor means of ascertaining her age, and although she was willing to go. *Regina v. Booth.* 521, 523 *note*.

2. ADMISSION.

The words "I must know more about it," said by a police-constable to a prisoner in the course of a conversation between them respecting the subject matter of the charge, immediately before apprehension, are not a sufficient inducement to exclude an admission.

Duties of a police officer as to questioning a prisoner. *Regina v. Reason.*

517

3. ASSAULT.

The prisoner was indicted for indecently assaulting two boys, each of whom was eight years of age. It was proved that the prisoner took the boys into a field, and did acts toward them which amounted to indecent assaults unless they consented to them. The boys stated in evidence that they did not know what he was going to do to them when he did each of the acts in question. Upon this evidence, the judge left to the jury the question whether the boys merely submitted to the acts ignorant of what was going to be done to them or of the nature of what was being done, or if they exercised a positive will about it and consented to what the defendant did; and told the jury that in the former case they would find the defendant guilty, in the latter case they would acquit him. The jury found the prisoner guilty on the ground that the boys merely submitted to his act not knowing its nature:

Held, that the direction of the judge was right, and the conviction must be upheld. *Regina v. Locke.*

512, 516 *note*.

4. BANKRUPTCY.

A debtor petitioned for liquidation by arrangement on the 8th of June. The first meeting of creditors was held, and a resolution appointing a trustee passed on the 28th of June. The registrar's certificate of the appointment was dated the 5th of July. By a summons, issued on the 29th of June, the debtor was summoned to appear on the 9th of July, and be examined under ss. 97 & 96 of the Bankruptcy Act, 1869. He appeared on the 9th of July, and took no objection to the summons. The examination was adjourned to the 12th of July, on which day he again appeared without objection, and was examined. The examination having been admitted in evidence against him on a subsequent indictment for an offense under s. 11 of the Debtor's Act, 1869:

Held, that supposing the summons to have improperly issued before the registrar's certificate of the appointment of the trustee had been given, the defect was only an irregularity, which the debtor had waived by appearing and submitting to be examined without objection; and that the examination was properly admitted in evidence. *Regina v. Widdop.*

507

CRIMINAL LAW.

5. BANKRUPTCY.

Quere—whether the court for the Consideration of Crown Cases reserved can entertain a question as to quashing an indictment, reserved at the trial.

6. The Debtors Act (82 & 83 Vict. c. 62), s. 19, enacts: That in indictments for offenses under that act it shall be sufficient to set forth the substance of the offenses charged in the words of the act, specifying the offense, "without setting out any debt, act of bankruptcy, trading, adjudication, or any proceeding in, or order, or warrant, or document of any court acting under the Bankruptcy Act, 1860."

Held, That an indictment for misdemeanor framed upon sect. 11, sub-sec. 13, of the act, which enacts, "that if within four months next before the presentation of a bankruptcy petition, the trader by any false representation or other fraud, has obtained any property on credit and has not paid for the same," which merely charged "that a bankruptcy petition was presented against the defendant to the county court, etc., upon which the defendant was adjudged bankrupt, and that the defendant within four months before the presentation of the said petition did by certain false representations obtain from B., on credit, certain property, and has not paid for the same," was sufficient in arrest of judgment under the above statute, and also under Peel's Act (7 Geo. 4, c. 64), s. 20. *Regina v. Watkinson.* 547

7. BIGAMY.

A *bonâ fide* belief by a wife that her husband is dead in no defense to an indictment for bigamy, unless he has been continuously absent for seven years. *Regina v. Gibbons.* 527

8. CONFESSION.

Prosecutrix lost her purse, containing 1*l.* 4*s.*, in a market, and asked the prisoner, who had been standing near her, whether he had seen the purse or seen any one pick it up. He replied that he had not. She, however, suspecting that he had robbed her, gave information to the police. A policeman, a short time after, went in search of the prisoner, and having found him, told him that the prosecutrix had lost her purse, and that it was supposed that he had picked it up, and added, "Now is the

time for you to take it back to her." He denied having it, and went with the policeman. As they walked along he commenced making a statement, but the policeman told him to say nothing until they saw the prosecutrix. Having met the prosecutrix after they had walked about 600 yards some conversation took place, and the prisoner was searched, and on a half sovereign being found, the prisoner said to the prosecutrix that he would make it all up to her. Twenty minutes had elapsed between the time of the policeman's remark, "Now is the time to take it back to her" and the prisoner's statement "that he would make it up to her."

Held, that there was no inducement held out to the prisoner, and that his statement or confession that he would make it all up to her was admissible in evidence against him. *Regina v. Jones.* 580

9. CONSPIRACY.

An indictment for conspiracy at common law will lie against two or more persons for conspiring to commit an offense for which special provision is made by statute.

2. The defendants, servants of a gas company under contract of service, being offended by the dismissal of a fellow servant, agreed together to quit the service of their employers, without notice and in breach of their contracts of service, by reason of which the company were seriously impeded in the conduct of their business.

Being indicted for a conspiracy, it was contended that the stat. 84 & 85 Vict. c. 81, having determined that no act shall be illegal merely by reason of its being in restraint of trade, and having also defined the offense of "obstructing or molesting," and otherwise determined what shall deemed to be offenses as between masters and servants, had virtually declared all other acts not to be punishable.

But, *held*, that the provisions of the statute had not affected the common law of conspiracy, for which an indictment would lie.

The questions submitted to the jury were as follows:

1st. Did the defendants agree together to force the company against its will to employ a man it objected to employ?

2d. If so, was this sought to be done

by improper threats or molestations?

3d. Molestation being anything done with improper intent, to the unjustifiable annoyance and interference with the master in the conduct of his business, and such as would be likely to have a deterring effect on a man of ordinary nerve, — was a quitting of the employ without notice, and breaking of the contract of service, to the undoubtedly serious injury of the master, a molestation within the above meaning of the term?

4. Did the defendants agree together to force their employer to do what they desired by such a molestation?

5. Did the defendants endeavor to enforce their object by simultaneously breaking their contracts of service?

3. A conspiracy may be to do an unlawful act by unlawful means. If the jury deemed the object lawful, they would further say if the means employed were lawful or unlawful. *Regina v. Bunn*. 564.

4. CONTRIBUTORY NEGLIGENCE.

Contributory negligence is not an answer to a criminal charge, as to a civil action. *Regina v. Kew*. 605, 606, note

5. EVIDENCE.

It is not necessary to produce the charter of a city to prove that it is a municipal corporation; production of the minutes of the council at which the alderman was chosen for the ward is sufficient evidence, if it proves that the councillors of the ward were present on the occasion, and it is a sufficient compliance with sect. 43 of 5 & 6 Will. 4, c. 78. *Regina v. Turner*. 561

6. EVIDENCE.

Expressions denoting a bad feeling toward deceased made use of some time before the crime is committed are admissible in evidence, but the jury must receive them with great caution. *Regina v. Hagan*. 606

7. EXTRADITION.

The applicant, who had been an *avoue* in France, was now a prisoner in Jersey. He had been convicted *par contumace*, by the Cour'd Assize de Côtes du Nord, of three offenses, *abus de confiance*, or breach of trust,

fraudulent bankruptcy, and forgery. The first of these three offenses is not one for which a surrender is stipulated by the French treaty of 1843, or by the statute confirming it, viz: 6 & 7 Vict. c. 75, and there has been no extradition treaty with France since. By 33 & 34 Vict. c. 52, s. 3, sub-sect. 3, a fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded. By sect. 4, "an order in council for applying this act in the case of any foreign state shall not be made unless the arrangement. . . (2) is in conformity with the provisions of this act, and in particular with the restrictions on the surrender of fugitive criminals contained in this act. By sect. 27, 6 & 7 Vict. c. 75, amongst other acts, is repealed, "and this act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the acts so repealed) shall apply (as regards crimes committed either before or after the passing of this act), in the case of the foreign states with which those treaties are made, in the same manner as if an order in council referring to such treaties has been made, in pursuance of this act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this act." Affidavits concerning the French law were produced by both sides.

Upon a rule for a *habeas corpus* directing the governor of Jersey prison to produce the applicant, the court expressed doubts as to the exemption of old treaties from the restrictions of the act of 1870. They held, however, that the French law, although the affidavits were contradictory, carried out the restriction provided for. *Ex parte Bouvier*. 550

8. FORMER INDICTMENT.

An indictment was found at the county sessions at Bedford against the defendant for obstructing a highway.

Upon the certificate of such finding, the defendant was taken before a magistrate and bound by recognizance to appear and plead at the assizes. The indictment was not transmitted to the assizes, but was in the custody of the clerk of the peace.

Held, that the judge of assize had no power to order the clerk of the peace to send the indictment to the assizes; that as it was found at the sessions, and not transmitted for trial at the assizes, the court had no jurisdiction to try the same.

8. But a second indictment for the same offense being found by the grand jury at the assizes.

Held, that the defendant, being bound to appear by recognizance, must be called upon to plead to the second indictment. *Regina v. Wildman*. 603

9. GRAND JURY.

- Upon a bill of indictment being presented, the grand jury made an application for the deposition of an absent witness.

Held, per Byles, J., that they were entitled to peruse the deposition without formal proof that the witness was too ill to travel. *Regina v. Bullard*. 608

10. INDICTMENT.

There is no distinction between civil and criminal pleadings as to defective allegations which are aided by verdict at common law.

11. Indictment that "defendant and others unlawfully and wickedly did conspire and agree together, contrary to the provisions of the Debtors Act, 1869, and within four months next before the presentation of a bankruptcy petition against defendant, fraudulently to remove part of the property of defendant to the value of 10*l*., that is to say [enumerating divers articles], defendant then being a trader and liable to become a bankrupt."

To this there was a plea of not guilty, and a verdict of guilty and judgment. Error was brought on the ground that there was no allegation that defendant was ever adjudged bankrupt:

Held, that the fact of defendant having been adjudged a bankrupt

was not necessary to complete the offense of conspiracy; it was complete if the persons charged had agreed to remove the goods in contemplation of an adjudication being obtained; and that this, though not expressly alleged, must be taken after verdict, to have been proved before the jury; and that the defect was therefore cured by verdict. *Heymann v. The Queen*. 241

12. INDICTMENT.

The prisoner was indicted for stealing nineteen shillings and sixpence. He was proved to have stolen a sovereign:

Held, that by 14 & 15 Vict. c. 100, s. 1, the court at the trial had power to amend the indictment, if necessary, by substituting the word "money" for the words "nineteen and sixpence;" and that, by s. 18, the indictment so amended was proved. *Regina v. Gumble*. 505

13. INDICTMENT.

An indictment which charged that the prisoner printed and published a libel of and concerning B. O., the prosecutor, according to the tenor and effect following, viz.: "B. O. of C. (meaning the said B. O.), Game and Rabbit Destroyer, and his wife (meaning Charlotte, the wife of the said B. O.), the seller of the same in country and town"—

Held bad, for want of inuendoes, or averments showing that the words alleged to be defamatory charged an indictable offense, or had reference to the calling of the prosecutor. *Regina v. Yates*. 523

14. INDICTMENT.

24 and 25 Vict. c. 98, s. 28, enacts that "whosoever shall forge or fraudulently alter any process of any court" (with certain exceptions), "shall be guilty of felony."

Held, that an indictment for forgery under that section must allege an intent to defraud. *Regina v. Powner*. 525

15. INDICTMENT.

Prisoners were indicted for feloniously assaulting the prosecutor with intent to rob him. The jury found them guilty of an assault, but negatived the intent charged.

Held, that the prisoners could not, upon this indictment and finding, be

convicted of a common assault. *Regina v. Woodhall.* 529

16. LARCENY.

An indictment charged the stealing of "nineteen shillings in money" of the moneys of A. B. It appeared that A. B. got into a merry-go-round at a fair, and handed the prisoner a sovereign in payment for the ride, asking her to give change. The prisoner gave A. B. 11*d.*, and said she would give the rest when the ride was finished. After the ride was over the prisoner said A. B. only gave her 1*s.*, and refused to give her the 19*s.* change.

Held that the prisoner could not be convicted upon this indictment of stealing 19*s.* *Regina v. Bird.* 533

17. LARCENY.

A depositor in a post office savings bank obtained a warrant for the withdrawal of 10*s.*, and presented it with his depositor's book to a clerk at the post office, who, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for 8*l.* 16*s.* 10*d.*, and placed that sum upon the counter. The clerk entered 8*l.* 16*s.* 10*d.*, as paid in the depositor's book, and stamped it. The depositor took up that sum and went away. The jury found that he had the *animus furandi* at the moment of taking money from the counter, and that he knew the money to be the money of the postmaster-general when he took it up, and found him guilty of larceny:

Held, by a majority of the judges, that he was properly convicted of larceny. *Regina v. Middleton.* 536

18. LARCENY.

Prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which the prisoners got from him, and then refused to restore the onions or pay the price. The jury convicted the prisoners of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them, from the beginning.

Held, that the conviction was right. *Regina v. Slowly.* 545

19. PERJURY.

On the trial of an indictment for per-

jury committed at an inquest before the deputy coroner, evidence was given, by the prosecution that the coroner, who was also a county court registrar, was absent on his vacation, a vacation and air and exercise having been recommended by medical advisers for his health, which had become permanently impaired. It also appeared that the coroner, during his absence, spent three or four days every week in shooting, and that by far the greater number of inquests held in the district were held by the deputy coroner.

Held, that it was a question for the judge, and not for the jury, whether the coroner was absent at the time for a lawful or reasonable cause, within 6 & 7 Vict. c. 83, s. 1.

Held, also, that the inquisition was valid, and that the deputy coroner was lawfully acting at the time (sect. 2 of same statute). *Regina v. Johnson.* 549

20. RAPE.

If a man has or attempts to have connection with a woman while she is asleep, it is no defense that she did not resist, as she is incapable of resisting. The man can therefore be found guilty of a rape or of an attempt to commit a rape. *Regina v. Mayers.* 559

21. RES GESTÆ.

On the trial of a prisoner for the murder of his wife, a neighbor swore that a week before the alleged crime was committed the deceased visited her house, bringing an axe and a carving knife, and gave them to her to take care of.

Held, that the evidence of what was said by the deceased to the witness on handing her the instruments was admissible. *Regina v. Edwards.* 518, 519, *note*.

22. SUMMING UP.

Where one of two prisoners jointly indicted is defended by counsel, and without claiming his right to sum up by the counsel for the prosecution, the undefended prisoner has addressed the jury, the counsel for the prosecution may not afterwards sum up the case to the jury as against the defendant prisoner. *Regina v. Hampton.* 536

See CHAMPERTY, 245.

TRESPASS, 231, 233 *note*.

CUSTODY OF CHILDREN

See PARENT AND CHILD.

D.

DAMAGES.

1. An agreement for the sale of the tra e-fixtures, &c., of a public-house by W. to L. at a fair valuation, contained the following stipulations: that, in addition to the amount of the valuation, L. agreed to pay W. 50*l.* goodwill; that L. was to be allowed to take, in the event of him leaving, the said sum of 50*l.*; that L. should pay to W. 100*l.* for painting, &c.; that the rent was to be 75*l.* yearly; that six months' notice to quit should be given by either party; and that, "by way of making this agreement binding, each of the above contracting parties have deposited in the hands of H. the sum of 40*l.* each; and either party failing to complete this agreement shall forfeit to the other his deposit money as and for liquidated damages."

In an action by L. against W. for refusing to sell pursuant to the agreement "whereby the plaintiff had lost the advantage which would have accrued to him from the performance of the agreement by the defendant, and had lost the use of the money paid by him as such deposit as aforesaid."

Held, that the plaintiff's remedy for the breach was confined to the recovery of the 40*l.* deposited with H.

2. *Plea*, that the plaintiff sued H. for the two sums of 40*l.* deposited with him "as and for liquidated damages in respect of the said breaches, and recovered judgment in respect thereof."

Held, no answer to the action. *Lea v. Whittaker.* 335, 343 *note*.

See AGREEMENT, 493
CARRIER, 869.

VENDOR and VENDEE, 897.

DEDICATION.

See HIGHWAY, 236, 241 *note*.

DELIVERY.

See VENDOR and VENDEE, 897.

DEMURRAGE.

See ADMIRALTY, 316, 475.

DEPOSITOR.

See COUNTERCLAIM, 419, 424, *note*.
SET OFF, 419, 424, *note*.

DIRECTORS.

See PRINCIPAL AND AGENT, 256.
STOCKHOLDERS, 1, 10, *note*.

DISCHARGE.

See PRINCIPAL AND SURETY, 453

DISTANCE.

How measured, 429.

DISTRESS.

See LANDLORD AND TENANT, 224.

DIVORCE.

1. A wife married in 1863, cohabited with her husband until 1870, and in 1871 instituted a suit for nullity by reason of his impotency. Having failed to establish the charge, her suit was dismissed, and as she had separate property she was condemned in costs.

2. Relief in suits of this nature is never accorded by the court unless the petitioner be prompt in seeking it and sincere in the motive for doing so. A petitioner made cognizant within four or five years after her marriage of her husband's impotency could not delay proceedings for three years more without being open to the charge of want of sincerity or promptitude. *M. v. C.* 650

3. If a person employed by a husband to watch his wife for the purpose of obtaining evidence of her adultery, brings about an act of adultery, the husband cannot obtain a decree of dissolution on the ground of such adultery, although he may not have directed or authorized his agent to

bring it about. *Gower v. Gower*. 657,
662 note.

4. A Scotchman married a Scotchwoman in Scotland, and cohabited with her in Scotland until he discovered her adultery. He thereupon, in 1866, broke up his home and removed to England; and in 1871 he instituted a suit in England for the dissolution of his marriage on the ground of the adultery committed in Scotland previous to the separation. He swore in his examination that he had left Scotland with the intention of taking up his permanent abode in England.

The court, believing his evidence, held that he had abandoned his domicile of origin and acquired an English domicile, and that it had jurisdiction to dissolve the marriage.

5. The oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive, but the question for the court is whether, upon a review of all the circumstances, it gives credit to his evidence.

6. Adultery was committed in 1866, and a suit was instituted in 1871. The petitioner was a material witness on the issue of adultery. The inadmissibility of his evidence until after August, 1869, when the Evidence Further Amendment Act was passed, was accepted as sufficient explanation of the delay. Want of means is also a sufficient excuse for delay.

7. The wife's costs of counter charges of adultery against her husband were disallowed, although they had been paid into court, the evidence by which these counter charges were supported being false; and there being no reasonable ground for making them. *Wilson v. Wilson*. 663

8. After a decree nisi had been made on the prayer of the husband for a dissolution of his marriage, the respondent, under cover of an order of the court for access to her child, took possession of it, and removed it beyond the jurisdiction of the court:

The judge ordinary refused to alter the settlement made on the marriage of the parties, so far as relates to the property settled on behalf of the respondent in such a manner and for the express purpose to compel the re-

spondent to submit to the authority of the court, and to restore the child to the custody of the petitioner. *Symonds v. Symonds*. 674

See ALIMONY, 647.

DOMICILE.

See DIVORCE, 663.

DRAFT.

See BILL OF LADING, 724.

DRUNKENNESS.

See INTOXICATION, 502, 504, note.

E.

EASEMENT.

1. The plaintiff was the owner of certain premises, the eaves of which projected over adjoining land of the defendants and had become entitled by length of user to have the rain water drop from such eaves on to the defendant's land. The plaintiff in rebuilding his premises carried the wall abutting on defendant's land to a slightly greater height than before, and consequently raised the height of the eaves from the ground to the same extent:

Held, that in the absence of any evidence that a greater burden was thrown on the servient tenement by the alteration, the easement was not thereby destroyed, and the plaintiff was entitled to the right of eavesdrop from the premises as altered. *Harvey v. Walters*. 392, 396 note.

2. A natural stream divided itself at a point called E. into two branches; one branch ran down to the river Irwell; the other passed into a farm yard, where it supplied a watering trough, and the overflow from the trough was formerly diffused over the ground, and found its way ultimately into the Irwell. The second branch appeared to have been made by artificial means, but was of immemorial age.
3. In 1847 W., the owner of the land on which the watering trough stood

and thence down to the Irwell, collected the overflow into a reservoir, and conducted it by a culvert to a mill situated on the banks of the Irwell.

In 1865 W. became owner of all the rest of the land through which the second branch flowed.

In 1867, he sold the mill, with all water rights to the plaintiff.

In an action brought by the plaintiff against a riparian owner on the stream above E. for obstructing the flow of the water:

Held, that the plaintiff was entitled to maintain the action. *Holker v. Porritt*. 480

See HIGHWAY, 236, 241, note.

EAVES.

How right of drip from, lost. 892, 896
note

EJECTMENT.

See FORMER SUIT, 802, 816, note

EQUITY.

See FRAUD, 710 note.

INJUNCTION, 729.

PARTNERSHIP, 928 note.

ESTOPPEL.

See CARRIER, 848, 858 note.

INSURANCE, 438.

LANDLORD AND TENANT, 224.

EVIDENCE.

1. When the amount paid is presumptively the amount of damages. 493

See CRIMINAL LAW, 517, 518, 519
note, 530, 561, 603

PRESUMPTION, 17, 27 note.

EXECUTORS AND ADMINISTRATORS.

1. Rights of, as between themselves and the survivors of a partnership. 44, 712, 718 note, 904, 927 note.
2. In an action against an executor a plea of *plene administravit* was

pleaded, and the action having been referred, the arbitrator found against the defendant upon the plea, and the plaintiff accordingly signed judgment. The plaintiff afterwards brought his action upon the judgment against the defendant, suggesting a *devastavit*. The defendant sought to set up, by way of defense, facts which tended to show that, though assets had come to his hands before the judgment, and had been illegally appropriated, such misappropriation had taken place with the consent and concurrence of the plaintiff, and that he was therefore estopped from complaining of it:

Held (affirming the decision of the court below), that if the facts which the defendant sought to set up amounted to a defense, they might have been rendered available under the plea of *plene administravit*, and the defendant could not, therefore, set them up as negating the *devastavit*. *Jewsbury v. Mummery*. 825

3. An annuity was directed by will to be paid to H. whilst living, by equal half yearly payments, and a proportionable part of the annuity to be computed to the day of H.'s death, from the last preceding day of payment "to the executors and administrators" of H. A proportionate part, after H.'s death, was paid to the husband of H., but before he had administered to her estate, and he died without having done so, leaving his son his executor. The son administered to H.'s estate, and claimed the proportionate part of the annuity:

Held, that the payment to H.'s husband, was not a good legal payment, and that the son might recover the money.

4. *Semble*, per Kelly, C. B., that the payment was not a good equitable payment. *Mitchell v. Holmes*, 490, 498 note.

5. A grant of administration in the goods of a deceased limited to carry on proceedings in Chancery having lawfully issued and being still in force, the court will not revoke it in order that a general grant may be made to the party who in the first instance would have been entitled thereto. The proper course is to supplement the limited grant of administration of the rest of the goods of the deceased. *In Re goods of Brown*. 681

6. A married woman, whose husband was last heard of in 1853, died in testate in 1856. The court refused to grant administration to her next of kin without citing the husband or his representatives. *In the matter of goods of Nicholls.* 686

EXTRADITION.

See CRIMINAL LAW, 550.

F.

FACTOR.

See SET OFF, 290

FALSE IMPRISONMENT.

See RAILWAYS, 203.

FATHER.

See PARENT AND CHILD.

FENCE.

See RAILWAYS, 418.

FILING.

See FRAUD, 330.

FORGERY.

See CRIMINAL LAW, 535.

FORMER INDICTMENT.

See CRIMINAL LAW.

FORMER SUIT.

1. To entitle a defendant in ejectment to apply for a stay of the proceedings until the costs of a former unsuccessful action of ejectment are paid, it is not necessary that the parties should be precisely the same, or the premises sought to be recovered identical; it is enough that the plaintiff is the

same in both actions and that the same title in substance is in issue.

2. To induce the court to abstain from acting upon this rule, it must be clearly made out that the plaintiff's want of success on the former occasion was the result of perjury or fraud, or some miscarriage for which he was not responsible.

3. Before moving for a stay of the proceedings, the defendants had given the plaintiff the twenty days' notice to proceed, under s. 203 of the Common Law Procedure Act, 1853:

Held, that this was no waiver of their right to move for a stay of the proceedings until the former costs should be paid.

4. But, the probable amount of the costs being large, the court made it a condition that the time for proceeding to trial should be extended by six months. *Tichborne v Mostyn*, 302, 316, *note*.

FRAUD.

1. In June, 1871, P. assigned furniture and stock-in-trade to S. by an absolute bill of sale, as security for an advance of 20*l*. This bill of sale was not registered, but, before the expiration of the twenty-one days allowed by 17 & 18 Vict. c. 36 for registration, a second bill of sale was substituted for it; and the same operation was from time to time repeated down to the 15th of July, 1872, P. continuing all the time in possession and dealing with the goods as his own, and the 20*l*. being still a subsisting debt. The last bill of sale (which alone was stamped, and the consideration for which was stated to be a present advance of 20*l*.) was duly registered on the 1st of August, 1872:

Held, that the bill of sale so registered was available against the claim of an execution creditor of P., that there was a sufficient consideration for it, and that it was not avoided by 18 Eliz. c. 5. *Smale v Burr*. 390

2. Courts of Equity have jurisdiction to set aside wills obtained by fraud or undue influence and probate courts to refuse them probate. 710 *note*.

3. That the draftsman of a will takes a legacy under it, is suspicious only in connection with other circumstances indicative of fraud or undue influence.

710 *note*.

4. Some affirmative testimony must however be given tending to show that the will was the spontaneous intention of the testator.

710 *note*.

5. A legacy to the testator's physician is presumptively fraudulent, arising from the confidential relation between him and the testator.

710 *note*

6. So to any person, as an agent, a counsellor, or a guardian, sustaining a relation of peculiar confidence with the testator and obtaining the execution of the will.

710 *note*

7. So in favor of one living in adultery with the testator.

711 *note*

8. Although in all such cases if shown to conform to the testator's desires it is valid.

711 *note*

9. Mere gratitude or importunity is not however sufficient evidence of undue influence.

711 *note*

See BANKRUPTCY, 196, 424, 868, 898.

CARRIER, 343, 353 *note*.

INJUNCTION, 729.

INSURANCE, 438.

MISTAKE, 800.

PARTNERSHIP, 778, 904, 927 *note*.

PRINCIPAL and AGENT, 753.

STOCKHOLDERS, 748.

WILLS, 687, 700, 710 *note*.

G.

GENERAL AVERAGE.

See ADMIRALTY, 229.

GIFT.

See HUSBAND AND WIFE, 775.

WILLS, 686, *note*;

GOODWILL.

How far assets in hands of surviving partner. 938, *note*.

GUARDIAN AND WARD.

See PARENT AND CHILD.

H.

HABEAS CORPUS.

See PARENT AND CHILD.

HIGHWAY.

The plaintiff was the occupier of an arable field, across which was a public footpath, but the plaintiff and his predecessors had the right to plough up the footpath when ploughing the field. The public, when the way was muddy after being ploughed up, having deviated on to the plaintiff's field, the plaintiff, in order to prevent them from straying from the line of the footpath, placed hurdles on the sides of it, some of which were thrown down by the defendant:

Held, that the footpath having been dedicated to the public, with a reservation of the right to plough it up, on its becoming impassable after being ploughed up the public had no right, in the absence of evidence of such a prescriptive right, to pass over the adjoining parts of the plaintiff's field; and that the defendant was liable in an action of trespass. *Arnold v. Holbrooke*. 286, 241, *note*

HOMICIDE.

No defense that injured party refused to submit to surgical operation or died from improper treatment.

606 *note*

HOUSE.

Right of drip from eaves, how and when lost. 892, 896 *note*

HUSBAND AND WIFE.

1. A wife being executrix of her father paid money she received as such into a bank to an account in her own name as executrix. Her husband paid money of his own to this ac-

count, and the wife had drawn checks upon the account for payments of debts due by the husband and for payment of household expenses. The husband died :

Held, upon the facts of the case, that the wife was merely the agent of the husband, and that the money remaining in the bank belonged to his estate and not to the wife's. *Lloyd v. Pughe*. 775, 777 note.

See EXECUTORS AND ADMINISTRATORS, 490, 493 note, 686.
PARENT AND CHILD.

L

ILLEGAL TRUST,

When trustee cannot take advantage of fact that is. 826

INDICTMENT.

See CRIMINAL LAW, 241, 505, 523, 525, 529, 547, 603

INFANT.

See PARENT AND CHILD,
STOCKHOLDERS, 748, 890

INJUNCTION.

1. A bill having been filed by an assurance company for the cancellation of a life policy as having been obtained by concealment and misrepresentation, a motion was made to restrain an action at law upon the policy, which had been commenced immediately after the filing of the bill :

Held (affirming the decision of Malins, V. C.), that although the Court of Chancery had complete jurisdiction in such a case, yet the court of law was the most suitable tribunal for dealing with disputed facts respecting a policy of assurance ; and the motion for an injunction was refused.

2. When proceedings are commenced at law and in equity respecting the same matter, if the nature of the claim of the plaintiff at law is such that he could only enforce it at law, the court

of equity will be very reluctant, on an interlocutory application, to withdraw the case from the jurisdiction of the court of law. *Hoare v. Bremridge*. 726

See NUISANCE, 718, 724 note, 778.

INSURANCE, LIFE.

See INJUNCTION, 729.

INSURANCE, MARINE

1. C. & Co., shipowners, were in the habit of receiving shipments of cotton to be carried on deck, sometimes at the shipper's request and at his risk, in which case the bill of lading expressed it to be so shipped, and sometimes for their own convenience, in which case it was at their own risk, and a clean bill of lading was given. To protect themselves against probable loss by jettison in the case of cotton shipped as last mentioned. C. & Co., through the plaintiff, their insurance broker, had effected with the defendants, on the 29th of March, 1864, an open policy to a certain specified amount, to be subsequently declared on. A parcel of cotton consisting of 102 bales was shipped on the 20th of December, 1864, at Alexandria, on board a ship belonging to C. & Co. This cotton was intended to be shipped on deck at shipper's risk, but by mistake C. & Co.'s agent gave a clean bill of lading in respect of it. Being supposed to be at shipper's risk, it was not declared under the policy, but other shipments of cotton on various vessels, some of them subsequent in date to the shipment of the 20th of December, were declared to the full amount of the policy. The 102 bales were lost by jettison, and the holders of the bill of lading claimed payment of the value of the cotton. The plaintiff thereupon altered the declarations on the policy by declaring the 102 bales in substitution for a portion of the cotton subsequently shipped. According to the usage of the insurance business, as found in a special case stated between the plaintiff and defendants in an action to recover the value of the 102 bales on the policy of the 29th of March, in the case of policies on ships to be declared the policy attaches to the goods as soon as and in

the order in which they are shipped, in which order the assured is bound to declare them. In case of mistake as to the order of shipment he is bound to rectify the declarations, which is sometimes done even after loss:

Held, that C. & Co. had an insurable interest in the 102 bales of cotton, inasmuch as by the terms of the bill of lading, signed by their agent, and by which they were bound, the cotton was at their risk; that the usage, as stated in the case, was binding, since it was not unreasonable, and by virtue of it the declaration on the policy could be rectified even after the loss was known; that even apart from the usage as stated, the doctrine to be deduced from the authorities is that, according to the usage of merchants and underwriters recognized by the courts without parol proof in each case a declaration may be altered even after the loss is known, if such alteration be made without fraud, of which there was no evidence in the present case; and that the plaintiff was, on these grounds, entitled to recover the value of the 102 bales on the policy of the 29th of March. *Stephens v. Australasian Ins. Co.* 296

2. The plaintiff's insurance broker effected an insurance with the defendants on the chartered freight of the plaintiff's ship *Cambria* without disclosing to the defendants certain information, in his possession which it was material that they should know (October 10). In so doing he acted in good faith, supposing, from inquiries that he had made, that the information was incorrect. After initialing the slip, but before executing the policy, the defendants (October 13) became possessed of the information which the broker had not disclosed; and they afterwards executed and delivered out the policy without any protest or any notice that they would treat it as void (October 14 or 15). Upon receiving news of the loss of the vessel they gave notice to the plaintiff that they did not consider the policy binding on them (October 20). On the trial of an action upon the policy the learned judge directed the jury (in substance) that the defendants were bound to make their election within a reasonable time after they became aware of the concealment, and left it to them, without expressing any opi-

nion, whether the defendants had elected to go on with the policy:

Held (Cleasby, B., dissenting), a misdirection, on the ground (by Martin, B.), that if the conduct of the defendants in delivering out the policy would induce the plaintiff to suppose that he had a valid policy, they were estopped from denying it; (by Bramwell, B.), that delivering out the policy with knowledge of the concealment was *prima facie* an election, and threw on the defendants the burden of showing circumstances to explain it.

3. The information not disclosed by the broker had appeared in *Lloyd's List*, which is a daily newspaper containing hundreds of entries relating to shipping in all parts of the world, and circulating among shipowners, underwriters, and insurance brokers; the defendants were in fact subscribers to this newspaper:

Held, that the broker was not entitled to assume a knowledge by the underwriters of the contents of *Lloyd's List*. *Morrison v The Universal Marine Insurance Co.* 438

INTEREST.

PARTNERSHIP, 712, 718, *note*, 904,
927, *note*

INTOXICATION.

The contract of a man, too drunk to know what he is about, is voidable only, and not void, and therefore capable of ratification by him when he becomes sober. *Matthews v. Bagter.* 502, 504 *note*

J.

JOINT DEBTORS.

See PRINCIPAL AND SURETY, 458.

JURISDICTION.

See BANKRUPTCY, 771, 775 *note*.
CONTEMPT, 250, 256.
CRIMINAL LAW, 507, 540.
INJUNCTION, 729.
LEX LOCI, 354.
PARTNERSHIP, 928 *note*.

L.

LACHES.

See DIVORCE, 663.

PARTNERSHIP, 928, *note*.

LADING.

See BILL OF.

LANDLORD AND TENANT.

1. The plaintiff deposited household furniture at a depository to be warehoused at the rate of 80s. a year. At the time he thought he was depositing them with a company with whom he had had dealings before; and he received a receipt in the name of the company, which name was also over the door of the depository. The fact was that the company had sold their business to B., and let the premises to him, but they had authorized the use of their name. B. being in arrears for rent, the defendants seized and sold the plaintiff's goods under a warrant of distress from two of the directors of the company; on which plaintiff brought an action against defendants:

Held, that the case fell within the principle of *Swire v. Leach* (18 C. B. (N. S.) 479; 84 L. J. (C. P.) 150); and that the goods were privileged from distress, as things delivered to a person exercising a public trade to be managed in the way of his trade.

2. *Held* also, that the company were estopped from distraining as landlords by having allowed themselves to be held out as the persons with whom the goods were deposited. *Miles v. Furber*. 224.

LARCENY.

See CRIMINAL LAW, 538, 545.

LAW.

See INJUNCTION, 729.

LEX LOCI CONTRACTUS.

1. The cause of action, that is, the whole substantial cause of action—must arise and the garnishee must reside or carry on business within the city of London, in order to give the Lord Mayor's Court jurisdiction to attach

moneys, &c., of the debtor in the hands of a garnishee.

2. The defendants (who had no residence or place of business in London) drew bills in Philadelphia upon the Union Bank of London, and indorsed them in Philadelphia, and there delivered them to the agents—the plaintiffs, who remitted them to the plaintiffs in London. The drawees refusing to accept the bills, the plaintiffs issued an attachment out of the Lord Mayor's Court to attach moneys of the drawers in the hands of the garnishees, bankers in London:

Held, that the "cause of action" arose in America and not in London, and consequently that the garnishees were entitled to a prohibition. *Cooks v. Gill*. 854

LIBEL.

1. In an action brought in Her Majesty's Supreme Court for China and Japan, for false representations made by the defendant, occupying an official post in the service of the emperor of China, to the tsung-li-yamen, the head of the Foreign Board at Peking, respecting the conduct of the plaintiff as a professor in the college established there, which led to his dismissal by that board, the alleged misrepresentations being, that the plaintiff had asked to be relieved from his duties, and declined to perform them, and that he had absented himself from Peking at a time when his active services might be required at the college. The defendant, in reply, denied that he had made any false representations, and asserted that such representations as he had made were contained in a report made by him in the course of his duty, as an officer of the Chinese government. The judge in his summing up directed the jury that, whether the defendant had made false representations, and the Chinese government had dismissed the plaintiff in consequence, was a thing specially for the jury to consider, and whether the representations were warranted by facts. The jury found for the plaintiff, and gave large damages. A rule nisi was afterwards obtained for a nonsuit, or new trial, on the ground of misdirection, and that the verdict was against evidence. The misdirections complained of were that the judge did not

direct the jury that the representations were privileged; not leaving to the jury the question, whether the representations were willfully false; and that there was no evidence to go to the jury that the representations were willfully false. The Supreme Court discharged the rule. On appeal:

Held, by the judicial committee, that the judge's summing up was erroneous, that the representations complained of were privileged communications, that the judge ought to have explained to the jury the relation and position of the parties, and have told them that the action would not lie, if the statements were made honestly and in a belief of their truth, without proof of express malice, and not whether they were warranted in fact, and that the burden was on the plaintiff to prove that they were not so made.

Semble: Where the rules of pleading in a court in a foreign country having jurisdiction over British subjects are by petition and answer, the several paragraphs of the answer can be read together, and not as in English pleadings treated as separate pleas.

3. Her Majesty's Supreme Court for China and Japan, established by order in council of the 9th of March, 1865, under the treaty of Tientsin, having cognizance of all questions in regard to rights, whether of property or persons, arising between British subjects, "resident in or resorting to the dominions of the emperor of China," has jurisdiction to try such action for alleged false representations. *Hart v. Gumpach*. 138

4. The charge of a bishop to his clergy in convocation is, in the ordinary sense of the term, a privileged communication, on the well known principle that a communication made *bonâ fide* upon any subject matter in which the party has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminal matter which, without that privilege, would be defamatory and actionable; provided that, the occasion on which the communication is made rebuts the *primâ facie* inference of malice, in fact, arising from a statement prejudicial to the character of

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the plaintiff, and the *onus* is upon him to prove that there was actual malice, that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made.

So *held*, where the bishop of Sodor and Man, in a charge to his clergy in convocation, commented on a speech made by a barrister in his character of an advocate instructed to oppose a bill before the House of Keys, promoted by the government, vesting additional ecclesiastical patronage in the bishop, in which he impugned the conduct of the bishop, and attributed to him motives and conduct unworthy of his character and position.

5. *Held*, also, that the circumstances of the case warranted the bishop in sending such charge to a newspaper for publication, and that such course being in self defense, rebutted any presumption of malice on the part of the bishop. *Laughton v. Bishop of Sodor and Man*. 163

See CRIMINAL LAW, 528.

LIEN.

See ADMIRALTY, 475.
BANKRUPTCY, 855.
FRAUD, 330.
MORTGAGE, 881,

LIMITATION, STATUTE OF.

1. When runs against accounting by, or payment made to surviving partner. 44

LIQUIDATED DAMAGES.

See DAMAGES, 835, 843, *note*.

M.

MALICE.

What is in Criminal Law. 221, 223 *note*.

See CRIMINAL LAW, 521, 523, *note*.
LIBEL, 138, 162.

MANDAMUS.

When lies to compel restoration of corporator. 27, 48 *note*

MANSLAUGHTER.

See HOMICIDE, 605, 606 *note*.

MARINER.

See WILLS, 684, 686 *note*.

MARRIAGE SETTLEMENT.

1. The court has no power to vary a marriage settlement, so as to deprive an infant child of the marriage of an interest secured to it by such settlement. *Crisp v. Crisp*. 655.

See DIVORCE, 674.

MARRIED WOMEN, 71.

MARRIED WOMEN.

1. A covenant in marriage articles to settle an estate, after the payment of an annuity to the intended wife, "upon his issue" by the said intended wife, must be construed as a covenant for strict settlement, and excludes the husband from creating charges in favor of younger children.
2. By articles of marriage it was recited that the intended husband had received a sum of £600 from J. S., his intended wife, and he covenanted to settle upon her an annuity of £60 for her life, to commence from his death, charged upon his lands, with the ordinary powers of distress and entry, and to settle the residue and remainder of his said lands "upon his issue by the said" J. S., his intended wife. There were several children of the marriage. Some years after the marriage he executed a deed by which he charged on his lands various sums of money in favor of younger children, devising the lands themselves to his eldest son and his other sons successively in tail male:
Held, that this deed creating these charges was void, for that the covenant in the articles gave him no power to charge the lands for the benefit of the younger children, and must be

interpreted to mean that he would settle the lands in the ordinary form of strict settlement.

8. The younger children had, in the character of "incumbrancers," obtained an order from the Landed Estates Courts in Ireland for a sale of the lands and a distribution of the money, the produce thereof. This was done. But some time afterwards the eldest son, as "owner" of the lands, brought the whole matter by appeal before the Court of Chancery in Ireland, which reversed this order of the Landed Estates Court, and (the money having been brought into court) directed it to be paid out to the eldest son.

4. In this House the decree of the Court of Appeal was confirmed.

Held, that the Court of Appeal had, under 21 & 22 Vict. c. 72, s. 39, the Landed Estates Act, full power to set right, in all respects, the decision of the court appealed from, without any necessity for any fresh proceedings.

Per LORD CHELMSFORD: The proviso in the 64th section of that statute is confined to the case of an "owner" not absolutely entitled to the money produced by the sale of the estate.

Observations by Lord Cairns on the manner in which this covenant in the marriage articles would have been executed by the Court of Chancery upon a bill filed for specific performance. *Grier v. Grier*. 71

See HUSBAND AND WIFE, 775
POWER, 360.

MASTER AND SERVANT.

1. The plaintiff, a passenger on the defendant's line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage, just after the train had started, by one of the defendant's porters, who acted under an erroneous impression that the plaintiff was not in the right train for the place to which he had booked. The defendants' rules, a copy of which was given to each porter in their employ, assigned various specific duties to the porters, among others, that of not suffering passengers to get in or out of trains in motion, and concluded with a general direction that they were to do all in their power to promote the comfort

of the passengers and the interests of the company. It was proved to be the duty of the porters to prevent passengers going by wrong trains, as far as they could do so, but it was not their duty to remove passengers from the wrong train or carriage:

Held, affirming the decision of the court below, that there was evidence on which the jury might find that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendants' servant, and one for which they were therefore responsible. *Bayley v. Manchester, Sheffield, etc., Railway*. 384, 392 note

2. A master cannot maintain an action for injuries which cause the immediate death of his servant.
3. Declaration against defendant for injuries caused to E., plaintiff's "daughter and servant," by the negligent driving of defendant's servant, by reason whereof she afterwards died; claiming as special damage the loss of E.'s services, and her burial expenses.
Pleas, 3 that E. was killed on the spot.
4. That the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted. On demurrer to these pleas:

Held, (first by Kelly, C. B., and Pigott, B.; Bramwell, B., dissenting), that the 3d plea was good; secondly (by the whole court), that the 4th plea was bad. *Osborn v. Gillett*. 464, 475 note.

See RAILWAYS, 203.

MERGER.

See MORTGAGE, 736.

MINES.

See NEGLIGENCE, 208.

MISTAKE.

1. Certain property was put up for sale by auction, and in the particulars

which were advertised was described as an immediate absolute reversion of a freehold estate falling into possession on the death of a lady in her 70th year. By the conditions of sale, which were read in the auction room just previously to the sale, but were not printed or circulated among those present, the property was stated to be subject to three mortgages. The property was bought by the plaintiff, who stated that he was deaf and did not understand that he was buying an equity of redemption:

Held, on a bill filed by the plaintiff to have the contract for sale rescinded, that the description of the property in the particulars of sale was misleading, that the *onus* was therefore on the vendor to show that the purchaser was not actually misled, and that as he had failed to do so the plaintiff was entitled to have the contract rescinded and his deposit returned.

The decision of Malins, V. C., affirmed.

2. There is no general rule that actual fraud is necessary to induce a court of equity to rescind a contract for sale. The court acts on the same principle in rescinding contracts for sale as in setting aside other contracts and dealing which it considers unconscionable. *Torrance v. Bolton*. 800

MORTGAGE.

1. A security in the form of a trust for sale is a mortgage within the meaning of the 28th section of the statute of limitations.
2. Before 1829 L. had demised two estates to P. for long terms of years by way of mortgage. On the 11th of February, 1829, P. made to L. a further advance, and L., by a deed to which P. was a party, but not a conveying party, conveyed the fee in those estates and another estate to C., upon trust for P., his heirs, executors, administrators, and assigns, nevertheless upon the further trusts therein after declared; which were, to permit L. to continue in possession and receipt of rents till the 11th of August, and if L. should then repay the further advance with interest, and the other mortgages charged on the property and thereafter specified, to re

convey to L., his heirs or assigns; but in default of payment, then that C., his heirs or assigns, should immediately, or at their or his discretion, enter into possession, and sell the estates, and stand possessed of the proceeds on trust, in the first place, to pay costs, then the sums due to P., with interest, and a sum due on mortgage to another person with interest, and to pay the surplus to L., his executors, administrators, or assigns. L. at the same time attorned tenant to P. Default having been made in payment, P. entered into possession in 1832, and thenceforth received the rents and let the property. Sales were subsequently made of parts of the property, the last being in 1848, and C. conveyed to the purchasers, P. being a party, and it was agreed that all terms should be assigned in trust to attend. In 1871 L.'s heir-at-law filed a bill to have the trusts of the deed of 1829, carried into execution:

Held (reversing the decision of the master of the rolls), that the deed of 1829 did not create a trust of the estate for the benefit of the mortgagor which he could enforce, so as to bring the case within the 3 & 4 Will. 4. s. 27, c. 25, but was a mortgage within the meaning of sect. 28 of the same statute:

3. *Held*, also, that there was no implied merger of the terms created by P.'s earlier securities, and that those securities remained in force notwithstanding the deed of 1829:
4. *Held*, further, that although the deed created an express trust in favor of L. of the surplus proceeds of sale after paying incumbrances, no relief could be given to the plaintiff on this ground, as it was not alleged, nor was there anything to lead to the supposition, that there had ever been any such surplus:
5. *Held*, therefore (reversing the decision of the master of the rolls), that the bill must be dismissed with costs. *Locking v. Parker.* 736
6. When mortgagee will be allowed to add the costs of a litigation to his mortgage. 765
7. The owner in fee of a farm deposited deeds of conveyance of the farm dated 1774, by way of security for money

then due, writing at the same time a letter which stated that the deeds were the title deeds of the farm, and were to be a security. He afterwards deposited the subsequent title deeds of the farm, the earliest being dated 1787, with the bankers, by way of security for money due to them; the title was investigated by the bankers, and they had no notice of the prior charge:

Held (affirming the decision of the master of the rolls), that the letter created an equitable charge on the farm, and that under the circumstances credit must be taken to have been given by the owner of the prior charge to the statement made by the mortgagor, that the deposited deeds were the whole of the title deeds; and that the owner of the prior charge had therefore not been guilty of negligence so as to deprive herself of her priority. *Dixon v. Muckleston.* 831

MOTHER.

See PARENT AND CHILD.

MOTIVE.

See CRIMINAL LAW, 521, 523 *note* 606.

MURDER.

See HOMICIDE, 605, 606 *note*.

N.

NAVIGATION.

See ADMIRALTY.

NEGLIGENCE.

1. The defendant's canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defendants were authorized to take land compulsorily and construct the canal, doing as little damage as might be, and to do all things necessary for making and preserving and using the canal, making satisfaction for all damages to be sustained by the owners of lands and hereditaments taken or prejudiced by the execution of the

powers of the act. Commissioners were appointed who were to determine from time to time what sum should be paid for the purchase of lands, and also to determine what other distinct sum should be paid by defendants as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the act, to work the minerals; provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three months' notice to defendants, who might inspect the mines, and might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defendants to inspect the mines the owners were authorized to work them.

The canal having been constructed and used for many years, the plaintiff, who was owner of coal mines under the canal, gave defendants proper notice of his intention to work them: defendants did not inspect, and refused to purchase. Plaintiff proceeded to work the mines, without regard to the surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably disturb the strata, and that there was danger of the water escaping from the canal into the mines; but, except as above, plaintiff did not work his mines in any negligent or unskillful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, and without doing so he could not have obtained the full benefit of his coal. The canal was in good order when plaintiff commenced working his coal; and defendants did all they could to keep the canal watertight, by puddling, etc. During part of the time, while plaintiff's working was going on, they had dammed back the water, and so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for plaintiff to work out his coal. The defendants were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata be-

came dislocated and the water of the canal escaped through the cracks and flooded the workings, and plaintiff was obliged to abandon his coal.

The plaintiff thereupon brought an action, charging that defendants, having brought water into the canal, so carelessly and improperly managed the canal and the water, that the water escaped and flooded plaintiff's mine.

On the above facts, the court having power to draw inferences:

Held, affirming the judgment of the Queen's Bench, that an action of tort could not be maintained.

2. *Semble*, by Kelly, C. B., and Pigott, B., that the plaintiff was entitled to compensation under the act. *Dunn v. Birmingham Canal Co.* 208

3. General average losses having been incurred in the prosecution of a voyage, it became necessary to settle and adjust the proportion of the loss which the ship and cargo had respectively to bear, and in order to do so, the plaintiffs, the owners of cargo, and the shipowner agreed to refer the matter to the defendant, an average adjuster, and to be bound by his decision:

Held, that an action would not lie against the defendant at the suit of the plaintiffs for want of care in the performance of his duties as average adjuster, inasmuch as he was in the nature of an arbitrator between the parties. *Tharais Sulphur, etc. v. Loftus* 282

See CRIMINAL LAW, 605, 606 *note*.
MASTER AND SERVANT, 464
475 *note*
RAILWAYS, 218, 220 *note*, 418.

NEW PROMISE.

See BANKRUPTCY, 196.

NEWSPAPER.

1. No presumption that a party knew the contents of one to which he was a subscriber. 483

NOTICE.

See INSURANCE, 433.
NEWSPAPER, 433.

NUISANCE.

1. The amount of annoyance which will induce the court to interfere between the owners of adjoining buildings discussed and defined, and the nature and value of evidence in such cases considered.

2. Where a trifling trespass or an interference with an ancient right has been submitted to for six years, the court will not exercise its jurisdiction, but will leave the plaintiffs to their rights at law. *Gaunt v. Fynney*. 718, 724 *note*.

3. A waterworks company were authorized by their private act to take and use the water of certain springs which supplied a river upon the banks of which certain mills were situate. The act provided that the company should not abstract more than a certain amount of water before they had constructed a compensation reservoir for storing the water during floods for the benefit of the millowners. The act gave the company compulsory powers for acquiring land, streams, and springs for their undertaking, and powers to acquire by consent lands for constructing their compensation reservoir. The act contained a reservation of the rights of the owners and occupiers of any lands, mills, or works, to the use of the waters of the stream, except so far as provided and declared by the act. The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), was incorporated with this act.

The company constructed a compensation reservoir, and a subsequent act of parliament which gave them further powers, including powers of emptying and cleansing the reservoir, recognized this reservoir as a sufficient compensation reservoir for the millowners, and directed it to be maintained.

The owner of some dye works situate on the river below the reservoir filed a bill against the company, complaining that the effect of the reservoir was to make the water of the river more muddy than it was before its construction, and to render it unfit for the process of dyeing, and praying for an injunction to restrain the defendants from fouling the stream. These allegations being in the judgment of the court established:

Held (reversing the decision of Malins, V.C.), that the acts gave the defendants no power to foul the water; that the compensation clauses in the Waterworks Act, 1847, did not apply, inasmuch as the injury was such as the company were not authorized to commit; and that the plaintiff was entitled to an injunction.

4. *Quare*, whether sect. 6 of the Waterworks Act, 1847, gives compensation for injuries to the lands of third persons caused by works on land which could be taken only by consent. *Clowes v. Staffordshire, etc. Waterworks*. 807

NUNCUPATIVE WILL.

See WILLS, 684, 686 *note*.

O.

OFFICER.

1. Removal of "for cause" when justified. 27, 43 *note*.

See NEGLIGENCE, 282.

OVERRULING POWER.

See ADMIRALTY, 621, 631.

P.

PARENT AND CHILD.

1. A person, who has been duly appointed under 12 Car. 2, c. 24, s. 8, by the will of a father to be guardian of his child, stands in *loco parentis*, and having, therefore, a legal right to the custody of the infant, may, in order to obtain possession of such ward, claim a writ of *habeas corpus* which a common law court has no discretion to refuse, if the applicant be a fit person and the child too young to choose for itself.

2. Where however, the validity of the testamentary appointment is disputed, the court will direct an issue to be tried by a jury in order to establish the same. *Matter of Andrews*. 261

3. The rights of the father, in England, *at law*, during his life. 267 *note*.
4. His rights in the United States. 270 *note*.
5. The rights of the mother *at law*. 275 *note*.
6. The rights of the father and of the mother, *in equity*, during life. 275 *note*.
7. The right of the father to dispose of the custody of his children by testamentary appointment of a guardian. 278 *note*.
8. Their respective rights during the pendency of proceedings for divorce. 278 *note*.
9. The method of procedure to obtain the custody of a child *at law*, and *in equity*. 278 *note*.
10. To whom application may be made *at law*. 278 *note*.
11. To whom application may be made *in equity*. 279 *note*.
12. Where application may be made during the pendency of proceedings for a divorce. 279 *note*.
13. How far the courts will actively interfere to deliver the custody of a child. 279 *note*.
14. How far a parent may, by agreement, surrender the right to the custody of infant children. 279 *note*.
15. The right of a parent to access to children though not entitled to custody. 281 *note*.
16. Upon whom the duty of support devolves in cases where the custody is given to the mother. 281 *note*.

See STOCKHOLDERS, 748.

PARTIES.

See TRUST, 796.

PARTNERSHIP.

1. Where there is a remedy at law, and a correspondent remedy in equity, supplementing that of the common law, and the legal remedy is subject by statute to a limit in point of time, a court of equity in affording the correspondent remedy will act by analogy to the statute, and impose on the remedy it affords the same limit as to time.
2. Where, therefore, in the matter of enforcement of a legal right, the court of common law would, under the provisions of the statute of limitations, refuse the enforcement after the lapse of six years from the accruing of the right of action, a court of equity will, where its power to grant relief is asked for under similar circumstances, adopt the principle of the statute, and decline to grant such relief.
Per LORD WESTBURY: There is no fiduciary relation between a surviving partner and the representatives of his deceased partner: there are legal obligations between them equally binding on both.
Per THE LORD CHANCELLOR (Lord Hatherley): There is a fiduciary relation between them. The surviving partner alone having the legal interest in the partnership property, and being alone able to collect it, there arises a right in the representatives of the deceased partner to insist on the surviving partner holding the property, whenever received, subject to the rights of the deceased partner, and he cannot make use of the partnership assets without being liable to an account for them. This rule applies where there have been accounts settled between the representatives of the deceased partner and the surviving partner, and the latter afterwards receives a debt due to the partnership, recognized in the settlement of the partnership accounts, but not at that time received from the debtor.

3. K. advanced money to G. on the faith of a letter, which K. insisted constituted a contract of partnership in the profits of the business of the Italian Opera at Covent Garden. G. insisted that it amounted to nothing but an agreement to pay the amount of the loan and the interest on it out of the profits (if any should arise), but that the concern remained

his alone. The letters which passed between the parties were held to bear this construction, and therefore an account, as of the profits of a partnership, was refused.

The advance was made with reference to the business of the Italian Opera at Covent Garden, the lease of which theatre was in the name of G. alone. That theatre was burnt down in 1856, and G. hired another theatre (the Lyceum), and carried on the business of the Italian Opera there, and in two years' time returned to a new theatre, at Covent Garden, which had been built in the interval, and which the lease, in the former case, had been granted in his name alone:

Held, that the true construction of the letters between the parties showed that the agreement between them was confined to the old Covent Garden Theatre alone, and therefore an account of profits alleged to have arisen at the Lyceum and at the new Covent Garden theatres was refused.

4. T. advanced £12,000 to G. on the terms of partnership. T. made a will, leaving this money equally between K. and G. T. died in December, 1854, before old Covent Garden Theatre was burned, which event took place in March, 1856. There had been, before December, 1854, negotiations between G. and one H. to allow G. the use of Her Majesty's Theatre; but though a sum of £5000 (part of T.'s £12,000) had been paid to H. under these negotiations, he had never performed his contract. G. finally brought an action against H., and recovered judgment for £5000; but ultimately (after the death of T., yet within six years of the date of a bill filed by K. for an account) consented to accept £2,500 as a compromise. K., in December, 1864, filed a bill against G. for an account of profits in the partnership with T., and of what was due to K. in respect thereof, under T.'s will:

5. *Held* that the right of K. under T.'s will began in December, 1854, and was barred in equity, by analogy to the statute of limitations, the bill not having been filed till 1864:

6. *Held*, also (diss. LORD HATHERLY, L. C.): That the surviving partner not being a trustee for the executors of his deceased partner, the payment of

the £2,500 from H. within six years from the filing of the bill did not take the case out of the statute of limitations.

Per LORD WESTBURY: The phrase "comprised in the same account" in the 19 & 20 Vict. c. 97, s. 9, means that "would have been comprehended in." *Knox v. Gye*. 41

7. Agreement in writing entered into between W. & Co., British merchants, carrying on business at Calcutta with a Hindoo rajah, by which, in consideration of moneys already advanced, and which might be thereafter advanced by the rajah to them, they agreed to carry on the business subject to the control of the rajah in several particulars; stipulating that the rajah should receive a commission of twenty per cent. on all profits made by the firm, until the whole amount of the debt due to him should be paid off, with twelve per cent. interest upon all cash advances which had been, or might be thereafter, made by him to the firm. Further advances having been made by the rajah to the firm, W. & Co., executed to him a mortgage of certain tea plantations, to secure the then amount of his advances, and the rajah by a deed released his right to commission and interest under the original agreement between them. No proceeds of the business were ever received by the rajah, and though he was credited in the books of the firm with a considerable sum, that sum was never received by him, and was afterwards written back in the books of the firm. The rajah did not interfere or exercise any such control in the business as to make him an ostensible partner in the firm: *Held*, that, having regard to the restrictions and modifications made of late in the rule of law formerly prevailing, that participation in the net proceeds of a business made the participant liable as a partner to third parties, and looking at the whole scope of the agreement the primary object was to give security to the rajah as a creditor of the firm of W. & Co., and that the participation given him in the net profits of the business was not sufficient to establish a partnership between W. & Co. and the rajah, as regarded third parties.

Although a right to participate in the profits of a trade is a strong test of partnership, and there may be cases where, from such perception alone,

- it may as a presumption, not of law, but of fact, be enforced; yet whether that relationship does or does not exist, must depend on the real intention and contract of the parties.
8. In the absence of any law or established custom existing in India in respect to partnership transactions, the law of England is to be resorted to for principles and rules to guide the courts. At the same time the usages of trade and habits of business of the Indian community, so far as they may be peculiar or differ from those in England, are to be taken into consideration. *Mollwo v. Court of Wards.* 121
9. In taking the accounts of a partnership, interest after the dissolution will not in general be allowed to the partners on their respective capitals, though interest during the partnership with annual rests is allowed; but this rule may be varied by the terms of the articles, as, for example, by a provision treating the capital left in by a partner as an interest bearing loan.
10. Any sums of money received after the dissolution and retained by either partner ought to be debited to him, and applied first in reduction of the interest due to him, and then in reduction of his capital. *Barfield v. Loughborough.* 712
11. In the absence of an agreement that partners shall be allowed interest upon their capital none can be collected until settlement and a balance struck although one furnish more than his just proportion. 718 note.
12. Although general usage or general course of trade, that interest shall be paid a partner upon surplus capital, may be shown and entitle him to interest. 718 note.
13. And the partners may agree that interest thereon shall be paid, when the surplus capital and interest must be paid before any division of capital or profits. 718 note.
14. But if interest be charged upon the firm books to the knowledge, actual or presumed, of the partners, or a balance including interest be struck it may be recovered. 718 note.
15. A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm; but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or is in any way connected with it.
16. The plaintiff, an old established tailor, took the defendant, who had been his foreman, into partnership, and the business was carried on under the name of H. & P. The partnership was afterwards dissolved by a decree of the court, in which it was provided that the business of the partnership should belong to the plaintiff. The plaintiff accordingly kept up the shop under the name of H. & Co. Subsequently the defendant set up a shop only a few doors from the plaintiff's shop, and painted over the door the words "P., from H. & P.:"
- Held*, (affirming the decree of Malins, V.C.), that, having regard to the manner in which the names were painted up, the defendant had done that which was calculated to lead the public to suppose that he was still connected with the old firm, and that the plaintiff was entitled to an injunction. *Hookham v. Pottage.* 778
17. A testator was partner in a well established and prosperous business under articles by which, on the death of any partner, his share was to be taken by the surviving partners at a price to be ascertained from the last stock-taking, and to be paid by installments extending over two years, with interest at £5 per cent. per annum from his death. He appointed three executors, one of whom was one of his partners in the business, and another, some years after his death, became a partner; the third never was concerned in the business. The value of the testator's share was ascertained but not paid, the amount being allowed for some years to remain in the hands of the firm, who treated it in their books as a debt, and allowed interest on it at £5 per cent. per annum, with yearly rests. One of the testator's residuary legatees, upon becoming entitled to payment of her share, refused to accept payment on the above footing, and filed her bill against the executors claiming to be entitled to a share in

the profits of the business arising from the use of the testator's capital. The money had been left in the hands of the firm with the knowledge of the testator's family, and all his residuary legatees, with the exception of the plaintiff, approved of what had been done :

Held (reversing the decision of Bacon, V. C.), that the plaintiff is not entitled to any account of profits, the mere delay by executors in calling in a debt due to the testator from a firm of which some of the executors are members not giving his estate any right to share in the profits of the business

18. The testator devised his real estate upon the common trusts for sale, making his real and personal estate a mixed fund. His trustees and executors were advised that a few acres of freehold land which belonged to him might be advantageously sold in lots for building purposes, and that to develop their value it was desirable to build a villa upon part of them. They accordingly built one at a cost of £1600 out of the testator's personal estate. This villa had ever since been let at £30 a year, most of the other land had been sold, and the evidence tended to show that the outlay had benefitted the estate. Vice Chancellor Bacon having declared that the £1600 must be disallowed the trustees in passing their accounts :

Held, on appeal, that as the trustees had, in the *bond fide* exercise of their judgment, expended this sum as the best means of improving the estate, they could, at most, only be disallowed the amount of loss (if any) occasioned to the estate by the expenditure. *Vyse v. Foster.* 904, 927 note.

19. When surviving partners will be charged with profits and when with interest upon capital of a deceased partner, remaining in business. 927 note

20. What allowances made in such case and how profits determined. 927 note.

21. How far goodwill part of assets. 927 note.

22. Portion of the partners dissolved as against one insolvent. 928 note

23. Rights to profits lost by laches 928 note.

24. Right of survivor to purchase and when purchase by fraudulent. 928 note

25. Remedy in equity and not probate court. 928 note.

PASS.

See RAILWAYS, 218, 220 note.

PATENT.

1. In opposing the grant of letters patent, the burden is on the opponent to show that the grant would be clearly wrong.

2. Where the facts on which the opponent relies were within his knowledge when he opposed before the law officer, he cannot, when before the lord chancellor, raise a new legal argument on these facts; nor can he then bring forward evidence which he might have brought before the law officer. *Matter of Sheffield.* 866

3. An applicant for a patent two months after the date of his provisional protection applied for the great seal to be affixed. A week afterwards a caveat was entered, but the applicant did not, until six months from his original application had nearly elapsed, present a petition for the great seal :

Held, that his delay was not an objection to the sealing of his patent.

4. B. applied for a patent, and obtained provisional protection on the 30th of March, C. on the 3d of April. B. applied for the great seal on the 21st of May; C. obtained letters patent on the 22d of May, antedated, according to the usual practice, to the 3d of April. The patents appearing to be partially for the same matter :

Held, that, whether the conduct of C. had or had not been fraudulent, the letters patent granted to B. must bear date on the 21st of May, and not on the 30th of March. *Ex parte Bailey.* 758

5. It is the duty of the law officer to hear and determine which of two rival applicants for patents is entitled to a patent, and the question ought not to be remitted to the lord chancellor by directing warrants for both patents.

6. An applicant for a patent does not, by lodging a complete specification and obtaining protection, acquire the rights of a patentee so as, during the six months' protection, to prevent any other person who had previously applied for a patent for a similar invention from obtaining a patent.

7. It is no objection to the grant of a patent that another person has been making experiments and working towards a similar invention. *Matter of Henry.* 838

PAWNBROKER.

See PLEDGE, 363.

PAYMENT.

1. When to one subsequently appointed administrator good. 490, 493 *note*.

PENALTY.

1. When renders doing of act compulsory. 176

See DAMAGES, 335, 343 *note*.

PERFORMANCE.

See SALE, 200.

VENDOR AND VENDEE, 397, 399.

PILOT.

See STATUTES, 176.

PLEADING.

See CRIMINAL LAW.

EXECUTORS AND ADMINISTRATORS, 325

PLEDGE.

1. The 16th section of the 32 and 40 Geo. 3, c. 99, provided that in case the pawn ticket for goods pledged were lost, mislaid, destroyed, or fraudulently obtained from the owner thereof, and the goods remained unredeemed, the pawnbroker should, at the request of the person claiming to be the owner

of the goods, deliver to such person a copy of the ticket and a form of affidavit (now a declaration) stating the circumstances, and the person having obtained such copy and form of affidavit should thereupon prove his property in such goods to the satisfaction of a justice of the peace, and should verify on oath or affirmation before the said justice the truth of the particular circumstances attending the case mentioned in the said affidavit, "whereupon" the pawnbroker should suffer the person so proving such property to the satisfaction of such justice as aforesaid, and making such affidavit or affirmation as aforesaid, on leaving the copy of the ticket and the affidavit with the pawnbroker, to redeem such goods and chattels:

Held, that where a person having lost the ticket for goods pledged by him had, in accordance with the section, procured from the pawnbroker a copy of the original ticket, and a form of declaration, proceeded with the same before the magistrate, and having proved his title before him, straightway returned to the pawnbroker, and showed him the declaration which he had made, he was not bound to redeem the goods immediately, but might redeem them at any time at which he might have redeemed them if he still held the original ticket, and that the pawnbroker was not justified in the meanwhile in delivering the goods to a person producing the original ticket. *Burslem v. Attenborough.* 363

PLENE ADMINISTRAVIT.

See EXECUTORS AND ADMINISTRATORS, 325

POLICEMAN.

1. Duty of, as to interrogating prisoner 517

POWER.

1. A lady having a power of appointment by deed or will over certain leasehold property, which in default of appointment was vested absolutely in her, wrote and signed an unattested paper, by which, after referring to the property in terms sufficient to

identify it, she proceeded: "If I die suddenly I wish my eldest son to have it. My intention is to make it over to him legally if my life is spared." She died within three months, leaving this memorandum among her papers, and without having otherwise exercised her power:

Held (affirming the decision of the master of the rolls), that the memorandum was a defective execution of the power, and that equity would relieve against the defect in favor of the eldest son. *Kennard v. Kennard*.

860

PRESUMPTION.

1. The burden of proving an instrument to be unstamped lies, in the first instance, on the party who objects to its production on the ground that it is unstamped. Where there is no evidence on either side it will be presumed to have been stamped.
2. But when once satisfactory evidence has been given that at a particular time the instrument was unstamped, there is an end of any presumption of law in favor of its having been stamped; the onus of proof is shifted, and the party who relies on the instrument must prove it to have been duly stamped. *Marine Investment Co. v. Havaside*.
17, 27 note.
3. A state of facts once shown to exist is presumed to continue until the contrary is shown. 27 note.
4. None that party knew contents of a newspaper to which he was a subscriber. 493
5. When amount paid presumptive evidence of amount of damages. 493

See CRIMINAL LAW, 527.
FRAUD, 710, note.

PRINCIPAL AND AGENT.

1. The plaintiffs, a limited company, of which C. was managing director, had begun printing a periodical for D. & Co., a firm consisting of the defendant's son and two others, and the periodical was being sold on commission by S. The plaintiffs represented by C., refused to go on printing without

a guaranty, and the defendant consented to become security by drawing a bill on D. & Co., and indorsing it to the plaintiffs, upon the understanding that he was to have funds to meet it out of the debt accruing from S. to D. & Co. C. was told of this arrangement. Before the defendant drew this bill, C. had lent money to D. & Co., on his own account, and held their acceptance to his draft. When this latter bill became due, C. obtained an order on S. from the other two partners of D. & Co., without the knowledge or consent of the defendant or his son, and under this order C. obtained the amount due from S. to D. & Co., and appropriated it to the payment of this bill, the amount being more than sufficient to cover the defendant's bill. The plaintiffs having sued defendant on his bill:

Held, that the defendant had no defense as against the plaintiffs; for that the plaintiffs were not responsible for what C. did in getting his private debt paid, as, though he was their managing director, he was not then acting for them or in pursuance of any authority from them. *McGowan v. Dyer*. 256

2. A. being aware that B. wished to obtain shares in a certain company, represented to B. that he, A., could procure a certain number of shares at £3 a share. B. agreed to purchase at that price, and the shares were thereupon transferred, in part to him and in part to his nominees, and he paid to A. £3 a share. He afterwards discovered that A. was in fact the owner of the shares, having just bought them for £2 a share:

Held, that, on the facts, A. was an agent for B.: and A. ordered to pay back to B. the difference between the prices of the shares.

3. Decree of the master of the rolls reversed. *Kimber v. Barber*. 753

See RAILWAYS, 208.

PRINCIPAL AND SURETY.

4. Declaration on a bond given to the plaintiff by the defendant, which recited that by an agreement of even date the plaintiff had agreed to admit J. into his service as "clerk and traveller" (not further stating the terms of the agreement), and was con-

ditioned for J.'s accounting for and paying over to the plaintiff all moneys which he might receive on plaintiff's account; The breach alleged being that J. had received moneys for the plaintiff which he had not accounted for or paid over.

Pleas, on equitable grounds. 2. That the original agreement between the plaintiff and J. was that it should be terminable by one month's notice; and that the plaintiff and J. afterwards, and before the defaults sued for, made it terminable by three months' notice, without the defendant's consent.

That before the defaults sued for, J. had committed other defaults of the same kind; that the plaintiff had, with knowledge of those defaults, continued to employ J. in his service without notice to the defendant; and that the defaults sued for were committed during such continuance of the service. On demurrer to these pleas:

Held, first (Martin, B., doubting), that the second plea was bad, on the ground that it did not show that the term as to the period of notice was made part of the defendant's contract, and that the alteration alleged did not in fact materially add to the defendant's risk.

3. Secondly, that the third plea was good, on the authority of *Phillips v. Foxall* (3 Eng. Rep., 259). *Sanderson v. Aston*. 452, 457 note.

4. To an action on a bond the defendant pleaded that it was the joint and several bond of himself and J., and was executed by him as surety only for J.; that afterwards a composition deed was made between J., of the one part, and the plaintiff and another on behalf of all the creditors of J. of the other part, whereby J. conveyed to the parties of the second part all his estate to be administered for the benefit of his creditors "in like manner" as if J. had been adjudged bankrupt; and each of the creditors released J. from his debts "in like manner as if he had obtained a discharge in bankruptcy;" and that the plaintiff executed this deed without the consent of the defendant. On demurrer:

Held (by Kelly, C.B., and Bramwell, B., Pigott, B., dissenting), a good plea. *Cragoe v. Jones*. 458

PRIVILEGED COMMUNICATION.

See LIBEL, 188, 162.

PROBATE COURT.

See PARTNERSHIP, 928 note.

PROFITS.

See PARTNERSHIP, 904, 927 note.

PROMISE.

See BANKRUPTCY, 196.

R.

RAILWAYS.

1. The plaintiff was a passenger by the defendants' railway with a return ticket from M. to N. On reaching E., a station short of N., he got out, but was informed that he must pay an additional fare of 2d. This he refused to do. He was thereupon given into custody by the inspector of the defendants' station upon the charge of refusing to give up his ticket, or pay his fare, and thereby defrauding the defendants. This charge was dismissed. The plaintiff having brought an action of trespass and false imprisonment:

Held, that, as the defendants were empowered under s. 104 of the above act, to arrest persons committing frauds under s. 103, and as the inspector was their representative at E., it must be presumed, in the absence of evidence to the contrary, that the inspector had authority from the defendants to arrest persons supposed to be guilty of committing offenses against that section, and that the defendants were liable for his mistake. *Moore v. Metropolitan Railway Co.* 203

2. Declaration, that plaintiff was a passenger by defendants' railway, and they so negligently conducted themselves in the management of their railway that an engine and tender came into collision with the train in which plaintiff was travelling, and he

was injured thereby. Plea, that defendants received plaintiff to be carried under a free pass as the drover accompanying cattle, one of the terms of which was that plaintiff should travel at his own risk. Replication, that it was by reason of the gross and willful negligence of defendants that the accident happened. On demurrer:

Held, that the replication was bad; for that, whatever gross or willful negligence might mean, plaintiff, by the terms on the pass, had agreed that defendants should not be liable for the consequences of any accident happening in the course of the journey for which they would otherwise have been liable. *McCawley v. Furness Railway Co.* 218, 220 *note*.

3. The plaintiff hired of the occupier of some land adjoining the defendants' line of railway a stable for his horse. The horse was allowed to graze during the day on the land. One night it escaped from the stable on to the land, and thence, through a defective fence, on to the defendants' line, where it was run over and killed by a train. In an action for the value of the horse:

Held, that the plaintiff was entitled to the benefit of 8 & 9 Vict. c. 20, s. 68, whereby railway companies are bound to maintain sufficient fences for the protection of the cattle of the "owners or occupiers" of land adjoining their line, and that the defendants were therefore liable. *Davson v. Midland Railway Co.* 418

See CARRIER, 343, 353 *note*; 369, 869.
MASTER AND SERVANT, 384, 392
note.

RAPE.

See CRIMINAL LAW, 559.

RATIFICATION.

See INTOXICATION, 502, 504 *note*.

REDEMPTION.

See PLEDGE, 363.

RELEASE.

See PRINCIPAL AND SURETY, 458.

RES GESTÆ.

See CRIMINAL LAW, 518, 519. *note*.

RESCISSION OF CONTRACT.

1. When decreed on account of mistake. 800

See SALE, 200.

RIVER.

See NUISANCE, 607

RULES.

For preventing collisions, 641.

S.

SAILOR.

See WILLS, 684, 686 *note*.

SALE.

1. The defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into the plaintiffs' wagons at the defendants' collieries, in equal monthly quantities during the period of twelve months, at 5s. 6d. per ton. During the first month the plaintiffs sent wagons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled but the defendants declined to deliver any more coal:

Held, that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract. *Simpson v. Crippin*. 200

See VENDOR AND VENDEE.

SALVAGE.

See ADMIRALTY, 611, 615.

SET OFF.

1. To a declaration for money lent and paid and commission the defendant pleaded for a defense on equitable grounds that it was agreed between the plaintiffs and himself, on the following terms, viz., that he should consign certain rice to the plaintiffs' firm at Buenos Ayres and Monte Video, for sale by the plaintiffs for him upon commission; that the plaintiffs should make certain advances against the rice and pay the expenses of the consignment; and that the plaintiffs should sell the rice, and satisfy out of the proceeds the said advances, expenses, and commission, and pay to the defendant the balance remaining out of such proceeds. The plea further stated that the rice was duly consigned to the plaintiffs, under the agreement; that the claims in the declaration were the advances, expenses, and commission contemplated by the agreement; and that the plaintiffs were guilty of such negligence and improper conduct in the care of the rice and the management of the sale of it, that it fetched much less than it ought to have done, and insufficient to satisfy the advances, expenses and commission, whereas it would, but for their negligence and misconduct, have realized sufficient, and much more than sufficient, to have fully paid and satisfied the same, and the deficiency arising upon the sale, which was the claim for which the action was brought, had therefore entirely arisen from the plaintiffs' negligence, default, and misconduct:
- Held*, a bad plea. *Best v. Hill*. 290

2. The plaintiff having an account at the L. branch of the defendants' bank, which showed a balance to his credit exceeding 23*l.*, drew checks to that amount on that branch. At the same time he was indebted to the bank at their B. branch in an amount which, having regard to his whole account reduced his assets in the bank's hands to a few shillings only. The bank, without any notice to him, transferred the B. debt to the L. branch, and refused to pay the checks on presentment. There was no special contract between the parties that each account should be kept separate:

Held, that the bank was entitled at any time to combine the accounts, and to charge the L. account with the B.

debt. *Garnett v. McKewan*.

419, 424 *note*.

3. The O. Bank kept three accounts at the A. Bank, namely, a loan account, a discount account, and a general account. They from time to time received advances from the A. Bank, which were entered in the loan account, and to meet which they deposited securities with the A. Bank. In the course of the transactions the O. Bank deposited three bills of exchange with the A. Bank, accompanied by a letter stating that they proposed to draw upon them for £10,500, but that as their credit would not afford a margin to that extent, they sent these bills as a collateral security. The O. bank became insolvent and was wound up:

Held (affirming the decision of *Malins, V.C.*), that there was nothing in the course of dealing or in the terms of the letter to exclude the general rule that a banker has a lien on the securities deposited by a customer for the customer's general balance, and that the balance of the loan account being satisfied, the A. Bank might retain the bills for the balance of the general account. *Matter of European Bank*. 745

See STOCKHOLDER, 880.

SETTLEMENTS.

See MARRIAGE SETTLEMENTS.
STOCKHOLDERS, 1, 16 *note*.

SHIP OWNERS.

When not liable for goods burned or destroyed. 869, 879 *note*.

SLANDER.

See LIBEL.

SOLDIER.

See WILLS, 684, 686 *note*.

SPECIAL DAMAGE.

See CARRIER, 369.

SPECIFIC PERFORMANCE.

1. Of marriage articles when decreed. 71

2. C. agreed to let to W. several plots of ground for ninety-nine years, at one given rent, to be apportioned as thereafter mentioned. W. agreed to build on plot P twenty houses, on plot B eight, on plot G ten, and on plot Y five; and it was agreed that a separate lease of plot B, at a given rent, should be granted as soon as four of the houses on that plot and two of the ten houses on plot G were covered in, and that a separate lease of plot G should be granted as soon as five of the ten houses on that plot were covered in. W. mortgaged this contract to the plaintiff, and afterwards became insolvent. The plaintiff covered in the requisite number of houses on plots B and G, and applied for leases of them, denying at the same time, his liability to take upon himself the other parts of the agreement, upon the performance of which the granting of leases of plots B and G did not by the terms of the contract depend:

Held, by Wickens, V.C., that the plaintiff could have no relief, except on his assuming W.'s obligations under the original contract, and that as the court could not enforce these obligations, relief could not be granted:

3. *Held*, on appeal, that as by the terms of the contract the right to have leases of plots B and G depended only on conditions which had been fulfilled, the plaintiff, as assignee of W., was entitled to have leases of those plots granted to him, without assuming W.'s obligations under the entire contract. *Wilkinson v. Clements*. 782

4. Purchaser allowed for rents and profits if charged with interest. 848

See DAMAGES, 836, 843 *note*.
MISTAKE, 800.

STAMP.

See PRESUMPTION, 17, 27 *note*.

STATE COURTS.

1. When have jurisdiction of an action by an assignee in bankruptcy. 775 *note*.

STATUTES.

1. The Canadian Statute, 27 & 28 Vict. c. 13, entitled "An Act to amend the Laws respecting the navigation of Canadian Waters," enacts, by sect. 14, that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such within any place where the employment of such pilot is compulsory by law;" and the Canadian Statute, 27 & 28 Vict. c. 58, s. 9, enacts, "that the master or person in charge of each vessel exceeding 125 tons, coming from a port out of the Province of Quebec and leaving the port of Quebec for Montreal, shall take on board a branch pilot, for and above the harbor of Quebec, to conduct such vessel under a penalty equal in amount to the pilotage of the vessel, which penalty shall go to the decayed pilot fund:"

Held, on appeal, affirming the judgment of the Vice Admiralty Court of Lower Canada, in a cause of damage by collision, that these statutes are to be read and construed together as being *in pari materia*, constituting a compulsory pilotage, and exonerating the owner of a vessel having such pilot on board from liability for damage inflicted on another vessel.

Where a statute inflicts a penalty for not doing an act provided for, the penalty enacted implies that there is a legal compulsion to do the act in question, and this principle is not affected by the fact that the penalty has a particular destination. *Redpath v. Allan*. 176

STAY OF PROCEEDINGS.

See FORMER SUIT, 802, 816 *note*.

STOCKHOLDER.

1. Supposing it to be within the power of each of two parties to make a compromise all that a Court of Justice has to do with respect to it, is to ascertain that it has been *bonâ fide* made.

2. If so made, then, unless manifestly *ultra vires* of the parties, a Court of Justice ought to respect it, and not allow it to be questioned.

3. W. was an official in Scotland of an English company; the company desired to have a board of directors there. W. suggested to D., who lived in Scotland, to take shares and become one of the intended directors. D. objected on the ground that it was not a company of limited liability; W. assured him that he should be secured against loss, and that a bill was then about to be presented to Parliament to limit the shareholders' liability. D. thereon consented, and W. applied in his name for ten shares, obtained an allotment of ten, and paid the deposit on them. This deposit was never repaid by D. to W. D., at W.'s request, signed a proxy paper, and also a receipt for a dividend, which, however, was in fact paid to W. The bill in Parliament was not passed. Some time afterwards, a call was made on D. in respect of his shares, of which he took no notice; another call was made; he denied his liability, and desired W. to state the facts to the directors, and to claim his discharge from liability. W. did so; and the directors, who by the resolution of a general meeting possessed powers to make compromises in disputes with shareholders (though not, in terms, to cancel shares), consented that, on D.'s paying a certain call then due his shares should be cancelled. The money was paid and D.'s name was struck out of the list, and a balance sheet with his name struck out was presented at a general meeting, as containing a list of persons whose shares had been cancelled. So things remained till some years afterwards, when the company was ordered to be wound up; and D.'s name was put upon the list of contributories:

Held, that it must be removed therefrom; that the directors had had the power to make a compromise of a disputed claim, that this case came within the power and that the power had been *bona fide* and rightly exercised.

4. At the rolls, where the case was first heard, D.'s name was ordered to be removed from the list of contributories. On appeal, the lord justice directed it to be replaced on the list. This house reversed the lord justice's order, restored that of the master of the rolls, and directed that the costs on the appeal in the Lord Justice's

Court should be repaid to D. *Dixon v. Evans.* 1, 16 *note*.

5. A director of a company induced three of his children, who were minors, to apply for shares. Shares were allotted to each, and he gave them money to pay the sums payable on allotment. All the shares in the company were allotted. The company never paid any dividend, and an order for winding it up was made before any of the children had attained twenty-one. The infants were placed on the list of contributories, and an order was made against each for payment of an arrear of calls, but, their infancy having been discovered, no attempt was made to enforce it:

Held (affirming the order of the vice warden of the Stannaries), that the father was liable to pay the amount of these calls, as a loss occasioned to the company by his breach of duty as director in having shares allotted to infants. *Matter of Crenoev Wheel, etc., Co.* 748

6. In winding up a company, debts cannot be set off against calls.
7. A contractor agreed with a company to supply them with steam engines at a fixed price, and to take shares in the company, payment of the calls on which should not be enforced until at least two engines should have been paid for, and the contractor might set off against the calls the money due to him. The contractor took shares accordingly, and made two engines for the company, which were not taken by the company or paid for. The company was afterwards ordered to be wound up by the court, and a call was made by the liquidator:

Held (reversing the decision of Bacon, V.C.), that the contractor could not set off the amount due to him from the company under his agreement as damages or otherwise against the amount due by him on the calls. *Black & Co.'s Case.* 880

8. A shareholder in a company transferred shares to an infant, who transferred them to another infant, who transferred them to an adult, and all the transfers were registered. The company was ordered to be wound up more than a year after the first transfer, but less than a year after the last transfer:

Held (reversing the decision of the master of the rolls), that after the company had once obtained an adult shareholder, the intermediate transfers could not be avoided, that the shareholder ceased to be such at the date of the first transfer, and that he could not be put on the list of past members. *Gooch's Case*. 830

See TRUST, 796, 826.

STOPPAGE IN TRANSITU.

See BANKRUPTCY, 750.

SURETY.

See PRINCIPAL AND SURETY.

SURPLUS.

See WILL, 90.

SURVIVOR.

- 1 Rights of, between himself and representatives of deceased partner. 44, 712, 718 *note*, 904, 927 *note*.

See EXECUTORS AND ADMINISTRATORS, 686.
PARTNERSHIP, 760.

T.

TENDER.

See SALE, 900.
VENDOR AND VENDEE, 899.

THREATS

See CRIMINAL LAW, 606.

TITLE.

See BANKRUPTCY, 750.
VENDOR AND VENDEE, 822.

TRADE MARK.

See PARTNERSHIP, 778.

TRADES UNIONS.

See CRIMINAL LAW, 564.

TRANSFER OF INDICTMENT.

See CRIMINAL LAW, 608.

TRESPASS.

1. A railway company were possessed of a thoroughfare which had the appearance of a public street. The company allowed certain cabs to stand in the thoroughfare upon payment of a weekly sum by the drivers. The respondent, not being one of the drivers who paid, stood his cab in the thoroughfare, and refused to leave when requested on behalf of the company to do so:

Held, that the respondent was a willful trespasser within 3 & 4 Vict. c. 97, s. 16. *Poulger v. Steadman*. 221, 223 *note*.

See EASEMENT, 392, 396 *note*.
HIGHWAYS, 236, 241 *note*.
NUISANCE, 718, 724 *note*.

TRICK.

See CRIMINAL LAW, 545.

TROVER.

1. The plaintiff was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession, and afterwards went to M.'s house to remove them. Upon his arrival at the house he was met by the defendant, M.'s landlord, who told him that rent was in arrear, and that until it was paid the goods should not be removed; and measures were taken by the defendant to use force, if necessary to prevent their removal. It was then after sunset, and therefore too late in the day to distrain, and the defendant intended to prevent the plaintiff from removing the goods with a view of distraining on the day following. The plaintiff continued in possession of the goods, but made no attempt actually to remove them; and, except by intimating his intention to

prevent their being removed, the defendant not take possession of, or assume dominion over them. In an action of trover :

Held (by Kelly, C.B., Bramwell and Pollock, BB., Martin B., dissenting), that there was no evidence of conversion :

(By Bramwell, B.). That an actual prevention by force of the removal of the goods would not have amounted to a conversion. *England v. Cowley*. 497

TRUSTS AND TRUSTEES.

1. Stock standing in the name of a deceased trustee having been transferred to the commissioners for the reduction of the National Debt, a person claiming to be the legal personal representative of the beneficial owner petitioned for a retransfer :

Held (reversing the decision of Malins, V. C.), that an inquiry, who was entitled, could not be directed in the absence of the personal representative of the trustee :

2. *Held*, also, that a claimant who establishes his claim has no title to any accumulations arising from the investment of the dividends, his right being to have the stock retransferred and the amount of unpaid dividends paid to him in cash, without interest. *Matter of Ashmead's Trust*. 796

3. The chairman of a company, with the assent of the company, held in his name shares in another company, which had been purchased with the money of the first named company. The chairman became bankrupt :

Held (reversing the decree of the master of the rolls), that, though the purchase by one company of shares in another company was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his assignees and that he must transfer them as the company should direct. *Great Eastern Railway Co. v. Turner*. 826

See MORTGAGE, 786.
WILLS, 90, 849.

U.

ULTRA VIRES.

See STOCKHOLDERS, 1, 16 *note*.
TRUST, 826.

UNDUE INFLUENCE.

See WILLS, 687, 700, 710 *note*.

V.

VARIANCE.

See CRIMINAL LAW 505.

VENDOR AND VENDEE.

1. The defendant in April agreed to sell and the plaintiffs to buy 8000 tons of coal at 8s. 6d. per ton, "to be taken during the months of May, June, July, and August." No coal having been taken by the plaintiffs in May, the defendant wrote on the 31st of that month desiring the plaintiffs to consider the contract cancelled. The plaintiffs did not assent to this; but on the 11th of June the defendant definitely refused to deliver any coal and on the 3d of July the plaintiffs brought an action for this breach.

At the trial, which took place on the 18th of August, the plaintiffs proved that the price of coal had risen during the whole period since the beginning of May, and was still rising. No evidence was given to show whether the plaintiffs could have gone into the market and obtained a new contract for coals.

Held, that in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the difference between the contract price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried. *Roper v. Johnson*. 897

2. In December, 1870, W. bought from C. whisky in bond, to remain in bond to C.'s order rent free for twelve

months, after which warehouse rent to be paid. In March, 1871, the price was paid. On the 19th of February, 1872, W. wrote to C. directing him to forward a specified hogshead of the whisky, and inclosing a check of sufficient amount to pay duty and clear the whisky. On the 26th C. filed a petition for liquidation, having retained the check, but not paid the duty nor in any way complied with W.'s directions. At the time of sale the whisky had been all carried to W.'s credit in C.'s books, but had throughout been lying to C.'s order at a dock warehouse:

Held (reversing the decision of the chief judge and affirming that of the county court judge), that this hogshead did not pass to the trustee in liquidation as being within C.'s order and disposition, as the consent of the true owner had been determined by the demand of possession, though no notice had been given to the warehouseman. *Matter of Ward.* 822

8. A dispute arose between the trustees for a deceased vendor and a purchaser, the purchaser claiming to be entitled under his agreement to an additional piece of land. The trustees filed a bill and obtained a decree for specific performance, excluding the additional piece of land. The trustees had not allowed the purchaser to take possession of the rest of the land whilst the purchase money remained unpaid, and in the meantime the rest of the land was allowed to lie waste.

Held (affirming the decree of the master of the rolls), that the purchaser must be allowed to set off against the interest payable by him the amount of rent which might have been received, and the amount of deterioration. *Phillips v. Sylvester.* 848

4. H. sold 330 tons of bleaching powder to E., to be delivered thirty tons per month, payment to be made in cash fourteen days after each delivery. The whole amount was delivered except one installment of thirty tons due in December, 1871; but the November installment was not paid for. On the 20th of December, E. called a meeting of his creditors and declared himself insolvent. On the 23d of December H. wrote a letter refusing to deliver any more bleaching powder under the contract. In February following, E. was adjudicated bankrupt,

and the trustee applied to the court for an order upon H. to pay £130 damages for non-delivery of the December installment of goods:

Held (affirming the decision of Bacon, C.J.), that although neither the non-payment of the November installment nor the bankruptcy of E. would entitle H. to rescind the contract, yet he had a right, after the declaration of insolvency, to refuse to deliver any more goods till the price of both the November and December installments had been tendered to him:

5. *Held*, also, that H.'s letter of the 23d of December did not excuse the trustee of E.'s estate from tendering the price of the two installments before claiming damages for the non-delivery of the December installment. *Matter of Chalmers.* 899

See BANKRUPTCY, 750.
BILL OF LADING, 724.
MISTAKE, 800.
PRINCIPAL AND AGENT, 758.
SALE.

V.

VIS MAJOR.

See ADMIRALTY, 621, 631.

W.

WAIVER.

See CRIMINAL LAW, 507.

WAR.

See ADMIRALTY, 621.

WATER AND WATERCOURSES.

See EASEMENTS, 480.
NUISANCES, 807.

WILLFUL TRESPASS.

See TRESPASS, 221, 223 *note*.

WILLS.

1. Little stress can be laid on the use, in a will making a gift to a charity, of the word "condition;" it may mean the same as "intent and purpose," and may be employed to create a trust and nothing more.
2. In 1558, a testator gave certain houses in Old change to his son and the son's heirs, but, if the son died without issue, to the Wax Chandlers of the city of London, "for this intent and purpose and upon this condition," that they should distribute annually £8 in the manner therein described, viz., £3 18s. to the poor of St. Mary Magdalen, and 2s. to the churchwardens for their painstaking; 38s. to the poor of the parish of Bexley in Kent, and 2s. to the churchwardens of that parish for their pains; 35s. to the poorest men and women of the Company of Wax Chandlers, and the other 5s. to the master and wardens of the company, "and the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparation of the said houses and tenements." If the master and wardens should leave any of these things undone, the property was to go over to the testator's next of kin, "upon condition that they should do all these things." The son died unmarried, and the Wax Chandlers entered into possession, kept the premises in repair, and, after the great fire in London, rebuilt them. The rents had largely increased: .
Held, that the will created a trust; that all the income was exhausted by the appropriations of it directed by the will, and that consequently the whole was properly applicable to purposes of charity.
3. The Wax Chandlers had in 1790 purchased a small piece of property adjoining the devised land, and had built upon it, so that the original and the purchased property were now conjoined and formed one whole. There was no distinct proof as to the funds out of which this added property had been purchased. In the absence of such proof, it was held, that the added property must be treated as belonging to the Wax Chandlers; and it was declared that it did belong to them, and an order was made for an inquiry to distinguish the two properties, and for the application of the rents and profits thereof.
4. To declare under such circumstances as existed here that this added property was to be applied to the purposes of charity would be like following and taking possession of the back rents *bond fide* received by the company: a course which the practice of the court did not sanction.
5. "Reparation" of premises, used in a gift of those premises to a charity, must be held to comprehend their restoration in the event of any catastrophe befalling them. *Attorney General v. Wax Chandler's Company.* 90
6. A testator had three sons, John, Thomas, and Robert. He devised to each, in the same form of words, a separate property for life, and after a son's death to his child or children in fee. In case any one of the sons should die without lawful issue, the property of such son was to be divided equally between the two survivors "in the same manner as the estates herein-after devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned." At the end of the three devises came the proviso in these terms: "Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises, so specifically devised to such one or more of them so dying, unto his widow and her assigns for and during the term of her natural life." The youngest son died unmarried. His two brothers divided his property between them. The eldest son died, and after him the second son, each leaving a widow, but no child:
Held, that each widow was entitled to a life estate in all that had been possessed by her husband during his life.
7. The proviso is a limitation, and must be so construed. "Specifically" means the same thing, whether used in a devise of land or of chattels. "So" in this case is merely descriptive, and is the same as "hereinbefore." "So specifically" is therefore merely descriptive.
8. In this will the description was meant to apply whether the property was

- given directly, as in the first instance, or indirectly, as in the second instance.
9. The proviso being at the end of all the devises, must have a meaning applicable to all, and not be treated as if placed at the end of one, and thus made applicable to one only. *Giles v. Melsom.* 110
 10. The deceased having called in A., who was an illiterate man, to his room, asked him to make his mark to a paper, which he did. A., at the deceased's desire, then fetched his wife, who was living in the house, and she also, at the deceased's request, placed her mark on the same paper. There was no evidence that the signature of the deceased was on the will at the time these marks were made, nor did the deceased in any way explain to the witnesses the nature of the document they signed:
Held, that the execution was invalid. *Pearson v. Pearson.* 677, 680 note.
 11. Where persons are called to witness a paper, which they do, in the presence of the testator, he at the same time subscribing it and declaring that it is his last will and testament, a request to the witnesses to sign their names as witnesses may be presumed; and so from any other competent and proper circumstances. 680 note.
 12. If not subscribed by the testator in the presence of the witnesses he must acknowledge its execution in their presence. Execution and publication are distinct and independent acts; mere publication thereof without any other act is not a sufficient acknowledgment. 680 note.
 13. Although if a testator produce a paper to which he has personally affixed his signature, requests the witnesses to attest it and declares it to be his last will he has done all that the law requires. 680 note.
 14. An acknowledgement by the testator of his signature and execution of the will is equivalent to the actual seeing, by the witness, of the physical act of subscription. 680 note.
 15. And the fact that the testator knew the character of the paper he was about to execute may be shown against the testimony of the subscribing witnesses. 680 note.
 16. When the witnesses to a will are dead, or from lapse of time do not remember the transaction after diligent production of all the evidence possible the law will, if the attestation is in due form, presume a proper execution of the will. 680 note.
 17. Such presumption will have weight according to the known character of the deceased witness and his knowledge of what was requisite to the proper execution of such will. 680 note.
 18. And will be weaker when the subscribing witness signs by a mark, which is a sufficient subscription. 680 note.
 19. When the subscribing witnesses fail to prove the proper execution of a will others may be called. 681 note.
 20. So the positive recollection of one of the witnesses will not be overcome by the non-recollection of the other. 681 note.
 21. Although if all the proof fails to show that the testator in fact declared to one of the subscribing witnesses the will to be his last will and testament, probate should be refused. 681 note.
 22. An attestation in due form, with the other circumstances of the case, may warrant a jury in finding the due execution of a will against the evidence of the other subscribing witness, but would not, it seems, without regard to any extrinsic fact, support such a verdict against the positive evidence of a living witness. 681 note.
 23. It is not material which be first, the signature or the declaration, if both be done at the same time. 681 note.
 24. The witnesses must subscribe the will in the testator's presence. 681 note.
 25. And producing a will to which one has improperly signed his name as a witness and declaring it to be such, is not a valid signing by merely correcting the former signature. 681 note.

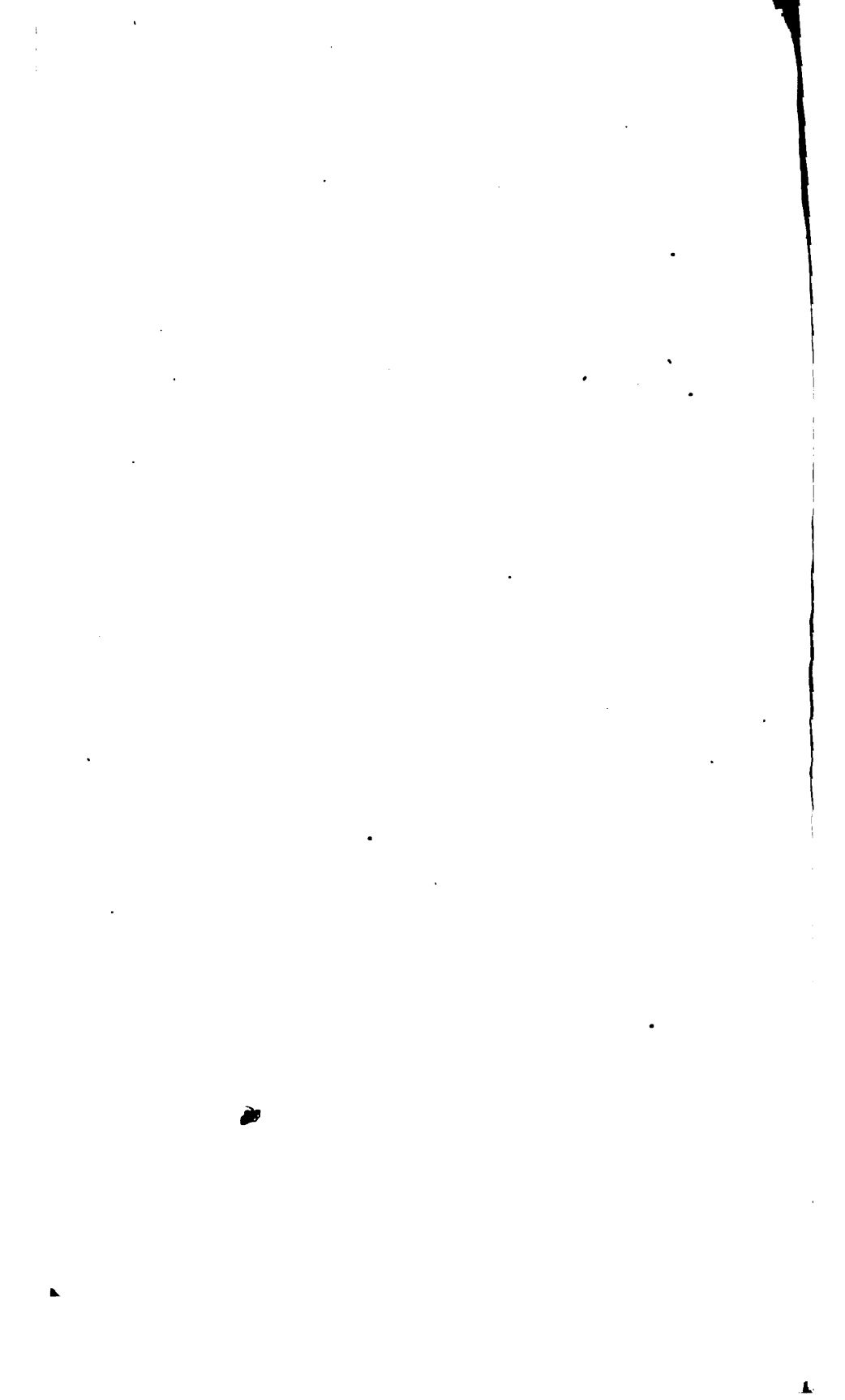
26. Although when the deceased lay in bed in one room, and the witnesses subscribed the will in an adjoining room where she could have seen them it was held a signing in her presence. 681 note.
27. In the case of a blind person it is sufficient that the witnesses sign the will in his presence and with his knowledge, so near him that he can by the aid of his other senses ascertain their presence. 681 note.
28. The testator must have completed his subscription and the witnesses theirs before the testator's death or the will is invalid. 681 note.
29. So where a witness supposed only one was necessary and did not sign his own name until subsequently, when he did so; held invalid. 681 note.
30. Though it is not necessary both should sign it at the same time or in the presence of each other. 681 note.
31. Where the testator is blind a will drawn in conformity with instructions given by him and properly executed will be held valid though not proven to have been read to the testator. 681 note.
32. Although in such case there should be some proof *aliunde* the will that the testator's mind accompanied the will. 681 note.
33. Where the testator is deaf, instructions for the will, the declaration that it is his will and a request to witness it, together with all the formalities, may be communicated by writing on a slate or by any other known and proper act indicating approval. 681 note.
34. Although the court may require the party to whom instructions were given by signs to show what they were. 681 note.
35. A mariner's will commencing, "Instructions to be followed if I die at sea or abroad," held to be conditional. *Lindsay v. Lindsay*. 684, 686 note.
36. A testator left two wills, containing different and inconsistent dispositions of his property. The first will appointed an executor, and the second did not revoke that appointment, and appointed no fresh executor, and contained no general words of revocation. With the consent of all parties probate of both wills, as together containing the last will of the deceased, was granted to the executor named in the first will. *In re Goods of Griffith*. 688
37. The plaintiff, a Roman Catholic priest, had resided with the testatrix and her husband many years as chaplain, and for a part of the time as confessor. He was confessor at the time the will in dispute was made. There was no evidence that the plaintiff had interfered in the making of such will, or that he had procured the gift of the residue to himself, or that he had brought such gift about by coercion or dominion exercised over the testatrix against her will, or by importunity not to be resisted. Moreover, it was not shown that even in the common affairs of life, in business, or in anything else, the testatrix was under the plaintiff's control or dominion:
Held, that there was no evidence to go to a jury on an issue of undue influence. Natural influence exerted by one who possesses it to obtain a benefit for himself is *undue inter vivos*, so that gifts and contracts *inter vivos* between certain parties will be set aside, unless the party benefitted can show affirmatively that the other party could have formed a free and unfettered judgment in the matter; but such natural influence may be lawfully exercised to obtain a will or legacy. The rules therefore, of courts of equity in relation to gifts *inter vivos* are not applicable to the making of wills. *Parfit v. Lawless*. 687
38. Although there is no rule of law which forbids a man to bequeath his property to his medical attendant, yet it is not a favorable circumstance for one in such a confidential position, with respect to a patient laboring under severe disease, to take a large benefit under such patient's will, more particularly if it be executed in secrecy, and the whole transaction assumes the character of a clandestine proceeding. In such a case the *onus* will lie very heavily upon the party benefitted to maintain the validity of the will. *Ashwell v. Lomt*. 700, 710 note.
39. A testator gave a sum of money in

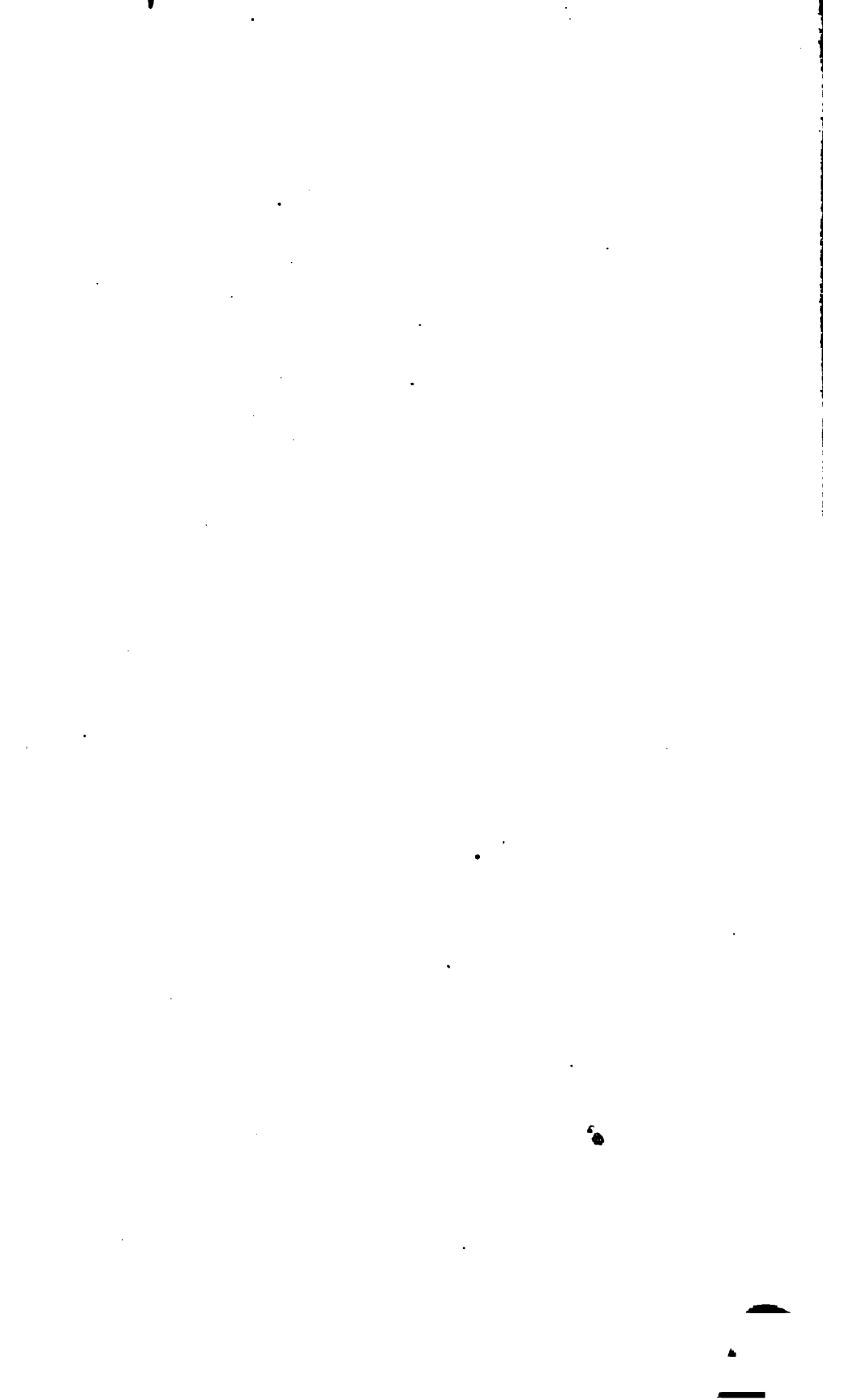
sixths, and directed his trustees to hold one-sixth in trust for each of his six daughters for life, with remainder to her children, to be transferred and vested at twenty-one or marriage; and he provided that in case any of his daughters should die without leaving a child, then her share should go in trust for his surviving daughters in equal shares, if more than one, during their respective lives, and after their decease for their respective children *per stirpes* and not *per capita*, in the same manner as the original shares:

Held, that on the death of a daughter without leaving a child who attained twenty-one or married, the children of other daughters, who had predeceased her took shares in her one-sixth.

40. The principles upon which the court considers the word "survivor" as not completely expressing the testator's intention, discussed.
41. Decision of the master of the rolls reversed. *Waite v. Littlewood*. 760
42. The lessee of a term of years in four houses assigned the term, by way of mortgage, to the owner in fee of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses Nos. 5, 6, 7, and 8, Stock street," and was at the time of his death in possession as mortgagee:
Held (affirming the decision of the master of the rolls), that the mortgage debt did not pass under the devise, but formed part of the testator's personal estate. *Bowen v. Barlow*. 842
43. A testatrix, after stating to the effect that as she could not feel confidence that any of her relatives would spend her money in the way she would approve, she felt she was doing right in giving it in charity, bequeathed her residuary personal estate, consisting of pure personalty, to trustees upon trust to invest it in consols, and to make out of the dividends certain fixed annual payments for charitable purposes. She further directed that when and so soon as land should at any time be given for the purpose as thereafter mentioned, almshouses should be built in three specified places. And she further directed that the surplus remaining, after building the almshouses, should be appropriated to making allowances to the inmates:
Held (reversing the decision of the master of the rolls), that the residue was well given in charity, for that the gift to charity was not conditional and contingent, but there was an absolute immediate gift to charity, the mode of execution only being made dependent on future events, and an inquiry directed as in *Sinnett v. Herbert*. *Chamberlayne v. Brockett*. 849
- See FRAUD, 710 *note*.
- WITNESS.
- See CRIMINAL LAW, 603.
- WORDS.
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| "Cause of action arose." | 854 |
| "Load in the usual and customary manner." | 816 |
| "Other." | 760 |
| "Reparation of premises." | 90 |
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| "Specifically." | 110 |
| "Survivor." | 760 |
| "Weight, value and contents unknown." | 849, 858 <i>note</i> |
- WRONGFUL DEATH.
- See MASTER AND SERVANT, 464, 475 *note*









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